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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 547

WILLIAM A. SMITH and WILLIAM J. REYNOLDS,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Tennessee.

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To the Supreme Court of the State of Tennessee.

To the Honorable the Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Tennessee rendered on July 27, 1959, in the case there entitled

William A. Smith and William J. Reynolds v. State of Tennessee.[1]

OPINION BELOW.

An opinion was entered by the Supreme Court of the State of Tennessee on July 27, 1959, and is reported in 327 S. W. 2d 308 (printed in full in Appendix A). On August 6, 1959, the petitioners filed a Petition to Rehear with the Supreme Court of the State of Tennessee and the petition was denied on September 3, 1959. The decision on the Petition to Rehear is reported with the opinion on the appeal in 327 S. W. 2d 308, 327. The Court's denial of the Petition to Rehear is contained in Appendix B. Said judgment[2] and opinion was rendered by the highest court of the State of Tennessee in which a decision could be had, and became final on September 3, 1959, wherein the petitioners were sentenced to not more than ten years in the state penitentiary.

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[1] The record in this cause accompanying this petition for certiorari consists of Volumes A through K. Volume A is the technical record consisting of pleadings, orders, etc., in the Trial Court. Volumes B, C, D and E are referred to on the covers as Bill of Exceptions and consist of verbatim transcripts of the proceedings on the trial. Volumes F and G are verbatim transcripts of the voir dire examination of jurors. Volumes H, I and J are verbatim transcripts of the hearing, testimony, etc., on the motion for a new trial in the trial court. Volume K consists of the assignments of error, briefs, opinions, orders and decrees in the Supreme Court of Tennessee. Each volume is page-numbered consecutively and there has been stamped on each page in large numbers page numbering so that the whole record is numbered consecutively, with the exception of the technical record contained in Volume A and referred to herein as "TR". With this exception, all references are made to R., Vol. . . . , p. . . . , and the page referred to is the large stamped number where the same is applicable.

The exhibits introduced in evidence are contained in a separate volume designated as "Exhibits". All records referred to have been certified by the Clerk of the Supreme Court of Tennessee, and although the record may be cumbersome, nevertheless, it is being submitted as prepared by the Clerk of the Court.

[2] Judgment, stay orders and orders surrendering petitioners to custody of the sheriff are made Appendices C, D, E and F.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., § 1257 (3), and the Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED.

Were these petitioners deprived of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States by means of the following proceedings in the courts of the State of Tennessee?

(1) By the Attorney General asking of these petitioners if they had taken the Fifth Amendment concerning the facts involved in this case and other matters before the Senate Select Committee on Improper Activities in the Labor or Management Field (McClellan Committee).

(a) By a State Court holding that testimony by a prosecution witness that "he (petitioner) was advised by the Teamsters Union to go before the investigating committee and take the Fifth Amendment" was "competent because it was another circumstance which the jury could consider to determine the guilt or innocence of defendant Reynolds."[3]

(2) By jurors, while locked up in the jury room and during deliberation, reading newspapers, listening to radio and television programs of highly prejudicial reports of the trial then in progress; and particularly newspaper reports of matters excluded from the jury during the progress of the trial as prejudicial and newspaper reports and television and radio comments of other and unrelated hearings and charges against these petitioners, all excluded during the courtroom proceedings.

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[3] See opinion of Supreme Court of Tennessee, 327 S. W. 2d 308, 319, also Appendix A herein.

(3) By the Trial Court allowing, repeatedly over the objection of counsel for the petitioners, the District Attorney General to ask prospective jurors in the presence of all other prospective jurors, if they were personally acquainted with Dave Beck and/or Jimmie Hoffa or officials of the Teamsters Union, in view of the statement by the Trial Judge that the only parties in interest are: "Just B & S and the Teamsters Union."[4]

CONSTITUTIONAL PROVISIONS INVOKED.

The constitutional provision invoked is Clause One of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty and property without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

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[4] This was denial of due process because the Teamsters Union and not these defendants were being tried by the court. For example:

> "The Court: This is one of the carriers involved?
> "General Clements: That is right. In other words, they are the only parties in interest.
> "The Court: Just B & S and the Teamsters?"
>
> (R., Vol. F, p. 700.)

The Trial Court in this cause presided over by the Hon. J. Fred Bibb, holding the Criminal Court for Knox County, Tennessee, and whose views on reference to jury selection dealing with union members was expressed in *Gerald William Nelson and John E. Hatton v. State of Tennessee*, 200 Tenn. 262, 292 S. W. 2d 727, certiorari granted by the Supreme Court of the United States, 352 U. S. 951, 1 L. Ed. 2d 242. Memorandum opinion by this Court, 355 U. S. 271, 2 L. Ed. 2d 257, 78 Sup. Ct. 327, in a per curiam opinion the writ of certiorari was dismissed for want of a *properly* presented Federal question.

STATEMENT OF THE CASE.

The petitioners were tried before a jury, required by the State law to be locked up during the course of the trial, upon an indictment containing five (5) counts which charged them in one count with felonious assault with intent to commit first degree murder, and the other four counts charging them with conspiracy to commit the same (TR., pp. 2, 5). The jury acquitted them of the charge of felonious assault with intent to commit murder,[5] and convicted them upon the four counts of conspiracy.[6] The Supreme Court of Tennessee affirmed the convictions.

On the voir dire examination of jurors, the Attorney General was permitted by the Court over the objection of counsel to ask prospective jurors, in the presence of all other prospective jurors and those jurors who had already been seated, whether or not they knew Dave Beck or Jimmie Hoffa[7] (R., Vol. F, pp. 797, 803, 804, 811, 812). The Attorney General, during the trial, asked these petitioners if they had not taken the Fifth Amendment before the Senate Racket Investigating Committee in Washington, D. C. The Court sustained the objection of counsel for the petitioners, but after having the evidence ruled out, the Attorney General continued to ask the questions, and when the counsel for the defense moved for a mistrial, the Court overruled the motion (R., Vol. D, pp. 539-542; Vol. E, pp. 647-651). The Court further permitted the principal state witness to testify that the petitioner Reynolds told her that the Union told him to go to Washington and take the

[5] Most of the opinion of the Supreme Court of Tennessee dealt with an attempt to find these petitioners guilty of the substantive offense of assault with intent to commit murder of which the jury had acquitted them. See 327 S. W. 2d 308, 315, also Appendix A.

[6] It should be noted that two of the four counts involved were mutually inclusive of each other.

[7] See footnote 4, *supra*.

Fifth Amendment before the Senate Rackets Investigating Committee (R., Vol. C, p. 419). The Supreme Court of Tennessee held:

> "This was competent because it was another circumstance which the jury could consider to determine the guilt or innocence of the defendant Reynolds."[8]

Daily newspapers were admittedly read by the jurors in their rooms during the progress of the trial, and deliberation on their verdict (R., Vol. J, p. 1631). The jurors listened to daily television and radio broadcasts dealing with the trial during the course of the trial (R., Vol. H, pp. 1232-1233, 1247-1248, 1293-1294; Vol. I, pp. 1317-1318, 1339-1340, 1358-1361, 1378-1379, 1390-1392, 1402-1403, 1410-1411, 1433-1434, 1435-1436, 1461-1464, 1465-1469; Vol. J, pp. 1490-1491). Many of the newspapers contained news stories about the trial in progress and statements of a prejudicial nature to the petitioners, which had been excluded by the Trial Judge, but which were read by the jurors after they returned to their rooms at night (R., Vol. H, pp. 1221-1236, 1253-1280, 1284-1292; Vol. I, pp. 1306-1330, 1342-1347, 1361-1371, 1379-1387, 1392-1394, 1411-1414, 1421, 1437-1438).

There appeared in the **Knoxville Journal**, which was published daily during the trial and read daily by the jurors during the course of the trial, which lasted seven days, a series of articles concerning the Teamsters Union

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[8] When this matter was presented to the Supreme Court of the State of Tennessee on the testimony of state's witness that the petitioners herein had told state's witness that he "was advised by the Teamsters Union to go before the investigating committee and take the Fifth Amendment", the Supreme Court of Tennessee states as follows: ". . . *(S)he said, among other things, that he said he was advised by the Teamsters Union to go before the Investigating Committee and take the Fifth Amendment. This was another circumstance which the jury could consider to determine the guilt or innocence of the defendant Reynolds.*" (Emphasis added.) 327 S. W. 2d 308, 319, also Appendix A.

and these petitioners, accusing these petitioners of numerous crimes of violence. The series began on the first day of the trial.[9] Following are some excerpts from the articles from the newspapers read by the jurors containing matters which were excluded from them as jurors in the Court Room, but read by them in their hotel rooms, all of which was prejudicial to the rights of these petitioners.

Knoxville News-Sentinel, Wednesday Evening, April 16, 1958 (Exhibit No. 12, Vol. H, p. 1276):

Headline:

"JUDGE THREATENS TO JAIL WITNESS",

and then a sub-heading in large letters:

"FEARS PERJURY BY TEAMSTERS".

In the body of this story there appeared:

> "TOOK FIFTH BEFORE" "As the State's admittedly 'circumstantial' case began, there was still no sign from the defense table whether Reynolds, now a truck driver, or Smith, business agent of Nashville Local 327, would take the stand.
>
> "The betting, however, was that they would not inasmuch as they repeatedly took the Fifth Amendment, on advice of Knoxville Attorney, William A. Reynolds, before the Senate Rackets Committee.

[9] The reports of the McClellan Committee had been in the possession of the publishers for approximately three months prior to the trial and were held by the newspapers and began to be published in serial form on the day the trial began (R., Vol. H, pp. 1134, 1135). According to the editor:

> "Editors Note: This is the first in a series of articles with verbatim excerpts from the text of the interim report of the U. S. Senate Select Committee on Improper Activities in the Field of Labor and Management. The series herein dealing with Teamsters, Union violence in Tennessee were held last December" (Exhibit No. 2, R., Vol. H, p. 1171).

"Attorney Reynolds is again representing Teamster Reynolds. They are not related. Smith, a ruddy-faced man whose black curly hair falls over his forehead, is represented by Nashville attorney Cecil Branstetter."[10]

The Knoxville News-Sentinel, Thursday evening, April 17, 1957 (Exhibit No. 14, R., Vol. I, p. 1370):

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[10] This leaves the petitioners on the well-known horns of a dilemma and as so aptly and precisely put by Dean Griswold:

"Many people have approached the Fifth Amendment in recent months in a rigid and mechanical way. They say: 'A person claiming the privilege against self-incrimination under the Fifth Amendment, or under a similar provision of a State Constitution, is guilty or else he is lying. Anyone can see that.' They say: 'It's as simple as two plus two equals four. There are only two ways. If he claims the privilege honestly, he must fear incrimination, which means that if he answers the question, he must admit that he has committed a crime. And if he claims the privilege dishonestly, of course, he is lying, and since he is under oath, he has committed perjury. No other explanation is logically possible.' That is what we are often told. And on either basis, the person claiming the privilege has condemned himself, and should be forthwith dismissed from whatever he has been doing, and generally blacklisted and deprived of his livelihood."

. . . . . .

"What does a person do when he finds himself summoned before a legislative committee in which he has no confidence? In recent experience, this has often been a one-man subcommittee, where the witness finds presiding a legislator who is judge, jury, prosecutor, castigator, and press agent, all in one. He has not thought these things through in great detail. He has read about the Fifth Amendment in the papers, and he may have received advice about it from his lawyer—and is it not his lawyer's duty to give him such advice? The witness is frightened by the publicity to which he has been subjected, by the T. V. cameras and lights, by the noise and confusion, and especially by the excesses which he sees before him. He has no confidence in the proceeding. In this situation he takes refuge in the Fifth Amendment. It will not do, I think, to say that this is not realistic."

Griswold, The Fifth Amendment Today, at pp. 56, 57 and 67 (1955).

Headline:

"BRUNETTE TELLS OF SHOOTING TALK",

and then a sub-heading:

"MRS. FREELS TELLS OF SHOOTING TALK",

and then a sub-heading:

"MRS. FREELS TESTIFIES IN TEAMSTER TRIAL".

Then the second paragraph of the news article, in dark letters reads as follows:

"A SENATE RACKETS COMMITTEE INVESTIGATOR SAYS THAT HE HAS FOUND MORE THAN $100,000.00 OF QUESTIONABLE AND POSSIBLY CROOKED ENTRIES IN THE BOOKS OF TEAMSTERS LOCAL IN PHILADELPHIA, PAGE 11."

Then the same article, continued on page 16:

"Yesterday's afternoon session was punctuated by a warning from the bench to 'reluctant' State witness Bobby Marston, a Nashville Teamster, a Pyhrric victory for the defense, in the admission of a bobble—which had touched off a previous 'perjury warning'—by the State."

"The State, trying to establish whether young Marston had lent his 'red and cream' 1955 Buick to Smith on June 11 drew several, 'I don't remember's' before Judge Bibb excused the jury. Judge Bibb said he had noted how 'haltingly' Mr. Marston had entered the court room, and could 'tell by his actions' that the witness is 'trying to conceal something'.

"He admonished Mr. Marston that 'You're supposed to tell the truth, the whole (emphasized) truth', whereupon Oxford educated defense attorney Cecil Branstetter of Nashville objected that the Judge

erred in judging Mr. Marston as 'hesitant'. Judge Bibb countered:

"'This witness is going to swear the truth or he is going to jail'. When Mr. Branstetter speculated that the jury—although excluded—might still be able to hear the Judge's statement, Judge Bibb pooh-poohed that and told the lawyer somewhat testily, 'you can expect (sic) all you want to, Mr. Attorney.'"[11]

Then in the next paragraph, headed:

"CLEMENT ADMITS ERROR",

the following appeared:

"Judge Bibb had warned a previous witness, Leo Woody of Nashville, a former B & S employee, about perjury, also when Mr. Woody seemed reluctant to discuss an affidavit the State thought he had given his former boss about a conversation with Smith . . ."

. . . . . .

Knoxville News-Sentinel, Sunday, April 20, 1958 (Exhibit 2; R., Vol. H, p. 1171), under the headline:

"MRS. FREELS DENIES AFFAIR",

the following story appeared on page A-12:

"Mrs. Lola Freels says Teamster, William J. Reynolds' sworn testimony regarding his relations with her is untrue.

"They have tried to ruin my character. That is the only way they can get revenge. Mrs. Freels said

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[11] The jurors, though sworn to do otherwise, read this newspaper account. Juror Davis testified as follows:

"Mr. Branstetter: I would like to ask the witness, now if he knew it was wrong to read the newspapers during the trial of this case. He said he thought it might have been or words to that effect.

"The Witness: It might have been. I knew that I wasn't supposed to read newspapers. I am guilty of reading it, knowing I shouldn't have" (R., Vol. I, pp. 1362, 1363).

yesterday in a telephone interview—Reynolds swore the intimate dates between him and the pretty brunette took place at the Teamster office here and at a Knox motel.

"But Mrs. Freels said that she had never seen the motel in question until Friday night. She said she saw it then, following Reynolds testimony a few hours earlier, when she, her father, and a man she has been dating since 1949 went there. She said the three of them went to the motel to look at it because of Reynolds' testimony."

"Mrs. Freels declined to reveal the name of the man who she said is the only person she has dated for several years. But she says Reynolds' testimony has not affected the feeling she and the other man have for each other."

"STILL ASKS PERMISSION." "She said this man told her, 'Don't worry about it. When you could go, I knew who you were with.' "

"She explained that the time she has for going out with her friend is limited because of her work and her two children, a son fourteen, and a daughter, twelve."

"Even though she is 34 years old, has been married, is divorced and is the mother of two, Mrs. Freels said. 'I still get permission from mama before I go anywhere.' "

"She lives with her parents, Mr. and Mrs. J. R. Hutchison, at 4521 Tillery Road.

" 'I've never stayed away from the house later than 10:30 because of the children,' she said, adding that her parents, other relatives and friends could verify that."[12]

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[12] At least one juror was influenced by this witness: Juror Davis testified further:

"A. Sir, when I came in here, I was asked if I thought I could hear it and give a decision that would be fair to the

Knoxville Journal, Monday, April 21, 1958 (Exhibit 2, R., Vol. II, p. 1171):

Headlines:

"LOCAL TEAMSTER OFFICIAL DUE TO TESTIFY TODAY IN REYNOLDS-SMITH TRIAL",

Box on Front Page:

"SENATE REPORT CALLS VIOLENCE ELSEWHERE 'PICNIC' TO TEAMSTERS HERE. Page 8."

On page 8, the headline across the top of the page reads:

"SENATE REPORT CALLS VIOLENCE ELSEWHERE 'PICNIC' TO TEAMSTERS HERE."

"(Editor's note: This is the first in a series of articles with verbatim excerpts from the text of the interim report of the U. S. Senate's Select Committee on Improper Activities in the Field of Labor and Management. The series of hearings dealing with Teamster Union violence in Tennessee were held last December.)"[13]

"Sen. John McClellan's Rackets Committee early last year heard a shocking recital of violence in the Scranton, Pa., area, but after hearing the Tennessee story last December, the committee by way of summary reported that 'in comparative retrospect the Scranton situation took on the tranquil aspects of a Sunday picnic.

State and fair to the defense. I tried my best to fulfill this obligation. I might have weaknesses in this sort of thing, but I tried my best to——

"As to the few weaknesses that I was thinking about at the time, when Mrs. Freels came in here after she had been accused of all of these incidents, she came in here—she had no powder, no rouge, no lipstick——" (R., Vol. I, pp. 1372, 1374).

[13] See footnote 9, *supra*.

"Altogether the committee heard evidence relating to a minimum of 173 acts of violence in Tennessee and neighboring states. The resulting loss through damage to property and reduced profit to employers was conservatively figured at $2,000,000.00.

"According to the interim report of the committee, most of the evils uncovered were directly traceable to certain officers of Teamsters Local 621 here, Local 327 at Nashville and Local 515 in Chattanooga."

The report continues:

"Unlike Scranton, however, their (Tennessee Teamsters) operations had a regular format. Of this the main feature was a professional and highly mobile goon squad, ready willing and eminently able, at any time or place, to perpetuate (perpetrate) brutalities of any degree desired.

"The dictionary defines a goon as 'one hired as a slugger, bomber, incendiary, or the like, by racketeers or outlaw unionists for terrorizing industry or workers.' It credits the origin of the word to a cartoonist searching for an apt name for some 'subhuman creatures' in his comic strip. On both counts the title accurately fits those so labeled in Tennessee.

"A vivid picture of the genus goon at work was painted for the committee by Frank Allen, terminal manager for the Terminal Transport Co. at Nashville. In April, 1955, Allen was paid a visit by W. A. Smith, the sturdily built assistant business manager of Local 327, widely known as Hard of Hearing Smitty for what was his sole apparent physical frailty.

"(Hard Hearing Smitty and W. J. Reynolds of Knoxville, are on trial in Knox County Criminal Court on felonious assault charges which were the outgrowth of two shootings on Asheville Highway in June, Reyn-

olds is a former business agent of Teamsters Local 621).

"A brief, if heated, discussion ensued as to why Allen had hired a certain non-union week end driver instead of choosing a union member from several suggested by Smith. Then Allen recalled: 'I thought they were leaving at that time, and I stood up at my desk and was looking for some papers on the desk, and then I looked up and Mr. Smith, W. A. Smith, was right in front of me. He said something to the effect,' 'Take your hand out of your pocket,' and then he hit me across the face."

"Testimony then showed that Allen was hit by Smith a number of times until practically 'senseless'. Allen told of a visit to a hospital where he was admitted with a broken nose, a slash over an eye and other injuries.

"Again quoting from the report: 'Sneak attacks, although only 1 (one) of their favorite methods of doing business. The characteristic technique would be to outnumber the victim and assault him from behind without warning; the specific followup varied.'"

The **Knoxville Journal**, Tuesday, April 22, 1958 (Exhibit 2, Vol. II, p. 1171):

Headline:

"TEAMSTERS MAKE USE OF DYNAMITE IN PROPERTY DESTRUCTION", and under the headline was the following article:

"(Editor's Note: This is the second in a series of the McClellan Rackets Committee reports dealing with the Teamsters Union crimes against property."

"Teamsters Union crimes against persons were paralleled by crimes against property which among other things included dynamitings, arson, smashing of windows and a varied assortment of truck sabotage.

"This was revealed in the interim report of Sen. John McClellan's Rackets Committee which last December spent eight days hearing testimony dealing with Teamster Union violence in Tennessee and neighboring states.

"The report continues:

"In this category, too, a kind of method prevailed, calculated to bring the property owner to heel or at least give him pause. With the precision of an orderly housewife, the painstaking goon would include on his shopping list a number of staple items. One was dynamite, another sugar, and a third, sirup (sic), bought at grocery stores in either cans or bottles and often in the large economy size.

"Either the sugar or the sirup (sic), but preferably the sirup (sic) could be put to especially effective use against one of the Teamsters' major foes; recalcitrant trucking managements. Judicious quantities of either item, poured unobserved into the fuel tank of a truck, would produce quick results. How quick was described in an affidavit by Leon Mays, driver for the Huber & Huber Trucking Co. of Knoxville, a company with which Local 621 was having trouble in August, 1955 over termination of a contract:

"I got back into my truck and drove about an hour when the truck suddenly bolted upward, in the middle of the road, and completely stopped. It had to be towed away by a wrecker. Later on I was informed that the truck motor had been siruped (sic) (p. 7170).

"An affidavit from another company driver who found his truck siruped (sic) the same night, James Church, directly linked W. J. Reynolds, president (Editor's note: later ousted), of Local 621, to this event. Both Church and Mays had dropped in at a truck stop earlier that evening, and Church recalled that Reynolds had been there, engaging a number of Huber & Huber drivers in conversation. That this was a deliberate maneuver to delay them was attested to by Lola Freels, who at that time worked in Local 621's office.

"Well, Mr. Perry, Charles Perry and W. J. Reynolds were in the office one afternoon discussing that they had to go out on a little trip that night and that they had to put some sirup (sic) in some trucks and the discussion was, I don't remember everything in detail, but the conversation was that Mr. Reynolds would stay in the restaurant and talk to the drivers while the sirup (sic) was being poured into the place where the oil is. He said something about that would give the truck a chance to run until it would stop for a little while, and then it wouldn't run any more (p. 7169).

"Mrs. Freels, a woman of redoubtable eyes and ears who served as secretary and bookkeeper for both President Reynolds and Secretary-Treasurer H. L. Payne (Editor's note: Known locally as the Silent One, Payne still holds his union post), of Local 621, also had some recollections about the preparations made for dynamiting projects:

"Mrs. Freels related how Reynolds told her that dynamite was bought out of town and of a conversation she overheard between Payne and Reynolds discussing purchase and payment for dynamite on one occasion.

"The report continues: From her observation post in Local 621's office, Mrs. Freels, the finest argument the Tennessee teamsters may ever have against careers for women, was able to affirm, both generally and specifically evidence that leading officials of the union in Tennessee, directed, partook of, and otherwise sanctioned terror tactics against anyone in labor or management athwart their path."

. . . . . .

The Knoxville News-Sentinel, Friday, April 18, 1958 (Exhibit No. 13, R., Vol. I, p. 1315):

Headline:

"RACKET PROBERS REPORT"

and then underneath:

"'PARTY' FOR RODDY BLOWOUT FOR GROCER".

"A McClellan Committee interim report says 'a notable feature' of the case of B. B. Powers, Burlington grocer, was 'that his difficulties stemmed from the Teamsters' annoyance with another larger firm, Roddy Manufacturing Co., from which Powers received his Coca-Cola consignments.

"'So poor was Roddy Co.'s rating in union circles,' the committee report continues, that 'Lola Freels (former Teamster bookkeeper), recalled Local 621 officials were planning to give it a 'little party' . . . Mrs. Freels clarified the import of this phrase: It meant there was going to be violence of some kind, either beating, dynamiting or tire-slashing or something.

"The little party scheduled for Roddy ended up, however, as a major occasion for Powers. (B. B. Powers, owner.)

"Early in September, 1956, Powers testified, the Coca-Cola truck drove up to his store, and its driver announced that the strike was over. As the truck was being unloaded, a big black Cadillac also drove up. Out of it stepped a man, Powers continued (who), identified himself as Local 621's president Reynolds (W. J. Reynolds, since deposed).

"He said 'I see you have bought Coca-Cola', and I said, 'Yes', and he said, 'Well the strike is not over', and I said, 'Well, these boys said it was', and he said, 'Well, why didn't you make arrangements, or why didn't you call to find out whether the strike was over or not?'

"The report further reads:

"I said, 'Now wait a minute; it is not my place to find out if the strike is over or not. If the strike is still on, why did you let them pass the picket lines?' He said, 'You're in for trouble' (p. 7190).

"Powers learned the meaning of trouble the next night when the dynamite did his property some $2000 damage.

"The report further reads:

" 'Unlike many acts of violence which blasted Knoxville's peace, this one produced two witnesses who not only had vital information but were willing to talk. One was John Chapman, a sheet metal worker, who, on the night before the dynamiting, had gone for groceries and saw a big black or dark-blue Cadillac parked opposite the Powers store; the next night he had seen it again in the same place.

"Chapman thought it was a pretty big car to be sitting there and, passing on the same side of the street, got a good look at two of the three men in it, mainly because they also took a good look at him.

A day or two later, while their faces were fresh in mind, he selected their photographs out of a batch presented to him by two police officers who came to interrogate him.

"Chapman was to later identify the men from pictures of W. A. (Hard-of-Hearing Smitty) Smith (assistant business agent of Teamsters Local 327 at Nashville) and Robert Belcher (a member of Local 327) at the committee's hearings last December."

"The report also says:

"'The other witness in the Powers case, Luther Hargis, had gone to get a pack of cigarets from a store opposite the Powers market at around 10 o'clock on the night of the dynamiting. He noticed a car in Powers' parking lot and, as he watched, a man got out of the car and walked toward the market. The man apparently sensed that someone was behind him, Hargis testified, and turned. When he did, Hargis noticed a light reflection on the side of his head.'

"A year later, during which time he had not seen the man again, he stood with Rackets Committee Investigator James McShane outside the Nashville Court House and picked out W. A. Smith."

Each of these articles were in newspapers which the Trial Court found as a fact a juror or jurors had read.[14] Material contained therein had been excluded as prejudicial and irrelevant during the trial.

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[14] "The Court: Now, what am I to conclude, gentlemen, from the statement of each one of these men that they did not buy a paper, did not take a paper in there. They saw them. They were in there. Two or three of them, as you say, read portions of them" (R., Vol. J, p. 1634).

FEDERAL QUESTIONS IN THE COURT BELOW.

At the trial of the cause, on the hearing of the motion for a new trial (TR, Vol. A, pp. 17, 57, 58, 62-63), on the Appeal to the Supreme Court of the State of Tennessee, and on the Petition to Re-Hear in that court, the petitioners contended that they were deprived of rights under the Fourteenth Amendment to the Constitution of the United States, on all three questions at issue.

The constitutional question was presented in the Supreme Court of Tennessee in Assignments of Errors Nos. 5 and 6, and in the petition to re-hear as follows:

"Assignment of Error No. 5.

"The Attorney General, representing the State, is not permitted to ask a defendant on cross-examination if in some other hearing the defendant, or defendants, did not 'claim immunity' or take the 'Fifth Amendment'."

Fourteenth Amendment to the Constitution of the United States (R., Vol. K, p. 1728).

"Assignment of Error No. 6.

"A defendant in a criminal proceeding under the State and Federal Constitution is entitled to a fair and impartial trial by an unbiased and unprejudiced jury, to meet the witnesses against him face to face, examine and cross-examine witnesses, and the jury may not be furnished evidence derived from any source other than that which is introduced in open court on the trial of the cause."

Fourteenth Amendment to the Constitution of the United States (R., Vol. K, p. 1729).

"Information obtained by a juror or the jury in a criminal proceeding, not introduced in open court and

which would be inadmissible in evidence, or which was excluded from them by the Trial Court, constitutes reversible error."

Due Process Clause, Fourteenth Amendment to the Constitution of the United States (R., Vol. K, p. 1730).

In the petition to re-hear:

". . . at the very beginning of the trial and prior to the selection of the jury in this cause, the Attorney General and the Trial Court agreed that the only parties in interest were B & S Motor Lines and the Teamsters Union. This colloquy was as follows:

'The Court: This is one of the carriers involved?

'General Clements: That is right. In other words, they are the only parties in interest.

'The Court: Just B & S and the Teamsters?'

. . . . . .

"The foregoing took place in the presence of all prospective jurors. This was an invasion of these defendants' constitutional rights under both the state and federal constitutions, particularly Article I, Sections 6, 8, 9 and 17 of the Constitution of Tennessee, and the Fourteenth Amendment to the Constitution of the United States" (R., Vol. K, pp. 1831, 1832).

The Supreme Court of the State of Tennessee considered the questions presented herein with reference to the denial of rights guaranteed to these petitioners under the Fourteenth Amendment to the Constitution of the United States and decided the same adversely to them.[15]

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[15] 327 S. W. 2d 308, 328 (Appendix A).

REASONS FOR GRANTING WRIT.

The questions presented in this petition involve serious and fundamental problems of the administration of justice and its compatability with a free press and Congressional Investigating Committees. This type of question, although somewhat unique in this petition, will continue to arise and therefore deserves interpretation as a result of the growth of Congressional Investigations and the utilization of modern means of disseminating information of these Congressional Investigations. The conflict here is between the Constitutional right of the news media, press, radio and television, and the Constitutional right of every citizen of the United States to a fair trial according to due process of law, both substantive and procedural. Although the conflict is not new,[16] that is, between the Constitutional rights of freedom of press and the Constitutional rights of individuals not to be deprived of their life, liberty or property without due process of law, another facet of it is presented in this petition, in that the substantive and procedural due process rights of these defendants are jeopardized by the exercise and abuse of the means of communication in conjunction with Congressional Investigating Committees.

These questions dealing with such conflicting interests and rights under the Constitution, have not been dealt with by this Court before. This Court has dealt with the conflicting rights of a defendant to a fair trial, with procedural and substantive due process protection, and freedom of the press in **Shepherd v. Florida**, 341 U. S. 50, 95 L. Ed. 740, 71 Sup. Ct. 549 (1951). In view of the above, and the continuing re-occurrence of this question in the future, this case affords the Court the opportunity of giving to the courts of the several states a more detailed criteria by which they are to scrutinize and evaluate

[16] Note, 1 Journal of Public Law 217 (1952).

claims of denial of procedural and substantive due process under the Fourteenth Amendment to the Constitution of the United States. These criteria should be directed towards resolving the possible conflict between the Constitutional guaranties of the freedom of the press, and other mass means of communication, and the reports of the activities of Congressional Investigating Committees, and the traditional guaranty of liberty and due process, both substantive and procedural, guaranteed to the individual by the Fourteenth Amendment to the Constitution when a governmental agency is seeking to deprive the individual of his life, liberty or property on the basis of the pressure and influence of this mass means of communication and Congressional Investigating Committees. This court has previously considered the influence of the press in **Shepherd v. Florida**, supra, and has discussed the tyranny of the press in creating a tyrannical government, in **Chambers v. Florida**, 309 U. S. 227, but it has not considered the combination of the press with a Congressional Committee so as to create a tyranny of government by these means.[17]

The consideration and authority of this court is needed, as is evidenced by the instant case, so that the individual may have a fair trial in a public tribunal, free of prejudice, passion, excitement and tyrannical power flowing from or through either the government or the communications media, or a combination thereof. In addition to the foregoing, the rule announced by this Court in **Marshall v. United States**, ... U. S. ..., 3 L. Ed. 2d 1250 (1959), as applicable to Federal Court practice in establishing standards for enforcement of the criminal law in the Federal courts, should be extended to the enforcement of criminal law by state courts and made a part of procedural and substantive due process under the Fourteenth Amendment to the Constitution of the United States.

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[17] *Shepherd v. Florida*, supra, and *Watkins v. United States*, 354 U. S. 178, 1 L. Ed. 2d 1273, 77 Sup. Ct. 1173 (1957), dealt with facets of these matters singularly and not in combination.

ARGUMENT.

POINT NO. 1.

Were these petitioners deprived of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States by the Attorney General asking of these petitioners if they had taken the Fifth Amendment concerning the facts involved in this case, and other matters, before the Senate Select Committee on Improper Activities in the Labor or Management Field (McClellan Committee), or by the State Court holding that testimony by a prosecution witness that "he (the petitioner) was advised by the Teamsters Union to go before the investigating committee and take the Fifth Amendment" was "competent because it was another circumstance which the jury could consider to determine the guilt or innocence of defendant Reynolds"?[18]

The petitioners were deprived of "due process" when the trial court overruled the Petitioner's motion for a mistrial after the Attorney General asked the petitioner Reynolds if he had not taken the Fifth Amendment in Washington before the Senate Rackets Committee. They were further deprived of "due process" when the Attorney General continued to ask the question of the petitioners, even after the Court had ruled the question was incompetent. They were further deprived of "due process" when the Trial Court permitted the witness, Lola Freels, to testify over the objection of counsel for the defense, that petitioner Reynolds told her before the hearing in the Trial Court that the Teamsters Union told him to go to Washington and take the Fifth Amendment.

It is the position of the petitioners herein that there is no difference in allowing this latter testimony to go to the jury and in allowing the Attorney General to ask the

[18] See opinion of Supreme Court of Tennessee, 327 S. W. 2d 308, 319, also Appendix A herein.

petitioners, and requiring an answer, as to whether or not they had taken the Fifth Amendment before the Senate Rackets Committee. The practical, prejudicial, and deadly effect on these petitioners was the same. Further, the Court allowed the wrong done these petitioners to be compounded by allowing testimony in the record that not only had they gone to Washington and taken the Fifth Amendment before the Senate Rackets Committee, but that they had further been told to do so by the Teamsters Union, which was not a party to the instant case, and was used for whatever prejudicial effect it might have on the jury.[19]

This clearly violated the petitioners' constitutional rights by using against them and to their prejudice, the fact that they had previously exercised another right granted them by the Constitution.[20]

POINT NO. 2.

Were these petitioners deprived of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States by jurors, while locked up in the jury room and during deliberation, reading newspapers, listening to radio and television programs, of highly prejudicial reports of the trial then in progress, and particularly newspaper reports of matters excluded from the jury during the progress of the trial as prejudicial and newspaper reports and television and radio comments of other and unrelated hearings and charges against these petitioners, all excluded during the court room proceedings?

The essential question here is whether or not a fair trial is possible when the press publishes and the jury reads during the course of the trial and during the course of its deliberations, evidence which the courts take pains

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[19] See footnote 4, *supra*.

[20] Prior to the decision in this case, the Supreme Court of Tennessee had held this to be reversible error in *Parrot v. State*, 125 Tenn. 1 (1911). See Griswold, *supra*, pp. 76-79.

to exclude from the record and from the members of the jury. In **Shepherd v. Florida**, supra, at page 52, Mr. Justice Jackson said:

> "Newspapers in the enjoyment of their constitutional rights may not deprive accused persons of their right to a fair trial."

In **Bridges v. California**, 314 U. S. 259, 86 L. Ed. 192, Justice Black took the position there are two things to be feared from newspaper criticism. One is disrespect of the judiciary, which he dismisses as rather remote, and the other, which is pertinent here, is a disorderly and unfair administration of justice:

> "The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word 'trial' connotates decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections to be won through the use of the meeting hall, the radio and the newspaper." (At page 271.)

In **Pennekamp v. Florida**, 328 U. S. 331, at page 357, Justice Frankfurter said:

> "While the ramparts of reason have been found to be more fragile than the age of enlightenment had supposed, the means for arousing passion and confusing judgment have been reinforced. And since judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print."

It appears clear to your petitioners that if judges can be influenced by the passion of newspapers, then jurors who are even more susceptible to criticism than are our judges,[21] and to pressures, either consciously or subconsciously, would likewise be influenced.

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[21] See footnote 4, *supra*.

In order for a case to come within the scope of the holdings of this court on this subject, there are several things which must appear. **First,** the reading of the newspapers must have taken place after the jurors had been selected. This requirement is clearly met in the instant case. **Second,** the newspaper account must have some connection with the trial itself, and not merely refer to similar trials or to criminal proceedings in general. This requirement is clearly and strongly met in the instant case. **Third,** it must appear that the juror or jurors actually read the account or some part of it. This requirement is clearly and strongly met in the instant case.[22]

The cases are too numerous to mention that if the account read by the juror after he has been selected, or during the course of the trial or deliberations is prejudicial to the defendant and likely to interfere with his right to a fair trial, or to due process, then the reading of it by a juror will be a ground upon which to have the verdict vitiated and a new trial granted [**Simmons v. U. S.**, 142 U. S. 148, 35 L. Ed. 968 (1891)].[23]

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[22] The court below so found in this case (R., Vol. I, pp. 1632-34).

[23] It seems to have been a general rule of law, accepted in nearly all jurisdictions, including Tennessee, that the reading of newspaper articles during the progress of the trial by the jurors or the obtaining by the jurors of any information other than that produced in open court, would constitute at the minimum a forced ground for a new trial. e. g. "The proof of the publication of the article substantially as stated is satisfactory. And if such publication was, in fact, in the hands of the jury, and read by them, or any of them, we think it would be sufficient reason for granting a new trial. It is well-established by repeated adjudications of this court that the verdict of the jury must be founded alone upon the evidence delivered in open court in the presence of the judge and the parties; . . ."

Carter v. State, 77 Tenn. 440, 442 (1882).

"On this subject, Judge McKinney, in the case last cited, said, viz.: 'The statement of the juror that the facts disclosed in the jury room produced no affect upon his mind, then he thought none upon

It has been repeatedly held that the reading of accounts referring to other criminal offenses, real or imagined, or

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the minds of the other jurors, is to be taken with great allowance . . . But, to vitiate the verdict, in this case, the proof is not upon the prisoner to show affirmatively that he was prejudiced by the improper evidence received by the jury. It is enough that he may have been prejudiced, and the law will so presume.'"

Ryan v. State, 97 Tenn. 206, 211-212 (1896).

"We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a prosecution's evidence. Cf. Michelson v. United States, 335 U. S. 469, 475, 93 L. Ed. 168, 173, 69 S. Ct. 213. It may indeed be greater for it is then not tempered by protective procedures."

Marshall v. United States, 3 L. Ed. 2d 1250, 1252 (June 15, 1959).

"The same rule applies generally to the reading of newspapers. If the accused was, or may have been, prejudiced, a new trial should be granted. Accordingly, a new trial will be granted when the jurors read newspaper articles which contain imperfect and incorrect reports of the trial which appeal to the passion and prejudices of its readers . . . or which declares accused guilty and contains charges or statements against them which would not have been admissible in evidence; . . . ."

23 C. J. S., § 1449, p. 1185.

"According to the rule laid down in a number of cases, if the account is prejudicial to the defendant, and likely to interfere with his right to a fair trial, the reading of it by jurors will be a ground upon which to have the verdict vitiated and a new trial granted."

31 A. L. R. 2d 425.

"Section 86. *The reading of newspapers.* . . . If it appears, however, that the tendency of the articles read by the jury was injurious to the party, the verdict should be set aside by the court and a new trial granted. Thus, according to the rule laid down in a number of cases, if a defendant in a criminal case has or may have been prejudiced by the reading of newspapers by the jury while in the discharge of their duty, the verdict will be vitiated and a new trial granted."

39 Am. Jur., § 86, p. 100.

allegedly committed by the defendant, has been held to be a ground for a new trial. Specifically, this rule has been applied where the article included statements that the defendant had been tried before, or that the evidence against him was claimed to be very strong, or that the argument for the prosecution was such that the defendant's friends gave up all hope of any result but conviction, or that it was expected that the deliberations of the jury would not last an hour before they would return a verdict. (**Mattox v. United States**, 146 U. S. 140, 36 L. Ed. 917 [1892].)

In the instant case the jurors read through seven days of trial, daily newspapers containing not only accounts and proceedings of the trial, but also "sob stories" concerning the prime witness (female) for the prosecution, and also featured articles about these defendants accusing them outright, and by innuendo, of numerous other crimes for which they had not been indicted and for which they were not on trial. Many of these articles contained highly prejudicial material which was excluded from the jury by the Court during the trial of the cause, but was available to the jury through the said newspaper stories and articles. The record shows also that one series of articles published in one of the daily newspapers, which was read by members of the jury during the course of the trial, and during the course of the deliberations, had been available to the editors of the newspapers for nearly three months, but were saved so that publication of the first article of the series could coincide with the beginning of the trial of the petitioners. The jury also admittedly heard radio and television newscasts not only describing the proceedings but also with comments, observations and background material not contained in evidence nor admissible in evidence.[24]

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[24] Griswold, *supra*, at pp. 77, 78, wherein he states:

> Another problem comes a little farther along the chronological line. In a good many states, including my own, prosecuting officers are much too free, it seems to me, in making

The very heart of this question was reached in the opinion of this Honorable Court in the case of **Marshall v. United States,** 3 L. Ed. 2d 1250, when the court said:

"We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through

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statements to the press in advance of trial. We are often told that a person has confessed. Sometimes, the full text of a confession is printed in the papers, full of lurid details. Sometimes prosecuting officers issue statements or give interviews in which the case is discussed in detail. This seems to me to be not only an impropriety, contrary to the ancient traditions of the bar, but also wholly unfair to the defendant who is entitled to a fair trial in court without a pre-trial in the newspapers. But, in recent times at least, have disciplinary actions ever been taken in such cases? Do our bar associations pay any attention to it at all? I have seen no evidence that they do. It may merit their more careful attention.

"3. Next we come to the reporting of the actual trials in criminal cases. This is a difficult and delicate question. Nevertheless it is an important one, and should not be allowed to go by default as it generally has in the past. Of course, we encounter here another principle of great importance, the freedom of the press. But all freedoms carry with them responsibilities; and the press should exercise more responsibility in this area than it has in this country in the past. If the press is unable to work out a way to meet this responsibility, then it should be given some help. As you know, the rules on this matter are very strict in England (and in Canada, too, for that matter), yet no one would say for a moment that England and Canada do not have a free press, indeed a press as free as ours.

"In this connection, there is a practice that seems to me to be particularly reprehensible, as to which the basic responsibility lies with lawyers rather than with the press. I am referring to the release of evidence to the newspapers. Sometimes this is an advance statement of what the evidence will be. In other cases it is evidence which has been excluded at the trial. It has been known that the jurors in a case read in the newspapers the evidence which the judge excluded from their consideration at the trial itself. Where such practices occur it should be possible to deal with them by the court or through the bar association. Yet I have never heard of a bar association taking action in such a case."

news accounts as when it is part of the prosecution's evidence. It may indeed be greater for it is then not tempered by protective procedures."[25]

POINT NO. 3.

Were these petitioners deprived of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States by the Trial Court allowing repeatedly over the objection of counsel for the petitioners, the Attorney General to ask prospective jurors in the presence of all other prospective jurors if they were personally acquainted with Dave Beck and/or Jimmie Hoffa, or officials of the Teamsters Union?

Neither Dave Beck or Jimmie Hoffa had any connection whatsoever with the matters before the court and their names were used in an attempt to prejudice the jurors against the petitioners before a word of proof was heard, as to their guilt or innocence, upon the charges on which they were to be tried.

This attempt to prejudice the jury, taken in connection with the statement of the Attorney General and the Trial Court:

"The Court: This is one of the carriers involved?

"General Clements: That is right. In other words, they are the only parties in interest.

"The Court: Just B & S and the Teamsters?

"General Clements: Yes, sir" (R., Vol. F, p. 790).

The indictment in this cause as originally set out was against the two petitioners herein and did not name the

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[25] In the decision in the instant case, the Tennessee Supreme Court attempted to equate reading of newspapers before a trial and the reading of newspapers during the trial, two distinct, independent questions, not comparable in any sense. The writer hereof finds no case prior to the instant case holding such to be comparable. (327 S. W. 2d 308, at p. 322.) Appendix A herein.

International Brotherhood of Teamsters or any Local thereof, as being a party defendant, nor B & S Motor Lines as a party defendant, but these matters taken together with the approach and attitude of the State of Tennessee, constituted a deprivation of due process, substantive and procedural, under the Fourteenth Amendment to the Constitution of the United States. In fact, it was the Teamsters Union that was tried by the jury involved in this case, and not these two defendants.

CONCLUSIONS.

For the reasons set forth above, it is respectfully submitted that the petitioners were convicted in violation of the due process clause of the Fourteenth Amendment, and they are at least entitled to a new trial. Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be granted, and the Supreme Court of the State of Tennessee reversed.

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Of Counsel.

Dated November ...., 1959.

Certificate of Service.

I, Cecil D. Branstetter, attorney for petitioners herein, and a member of the Bar of the Supreme Court of the United States hereby certify that copies of the foregoing Petition for Certiorari and Appendices were this day served on adverse parties here in accordance with Supreme Court Rules 21 (1) and 33 by depositing the same in the U. S. Post Office at Nashville, Tennessee, with first class mail postage prepaid addressed to counsel of record at his post office address, as follows:

Hon. George F. McCanless, Attorney General of Tenn., Supreme Court Bldg., Nashville, Tennessee, and Hon. Tom Fox, Ass't. Attorney General of Tenn., Supreme Court Bldg., Nashville, Tennessee

November ...., 1959.

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Cecil D. Branstetter.

APPENDIX A.

William A. Smith and
William J. Reynolds,

vs.

State of Tennessee.

Knox Criminal.
Hon. J. Fred
Bibb, Judge.

For Plaintiffs-in-Error:

Cecil D. Branstetter,
Nashville, Tennessee,

William A. Reynolds,
Ralph E. Vineyard,
Knoxville, Tennessee.

For the State:

Thomas E. Fox,
Assistant Attorney General.

Opinion.

(Filed Jul. 27, 1958, W. H. Eagle, Clerk.)

The plaintiffs in error were found guilty of the first four counts of a five count indictment charging them with (1) conspiracy to take the life of Davis Robertson and divers other persons, (2) a conspiracy to take the life of Thomas Copeland and divers other persons, (3) conspiring to commit a felonious assault with intent to commit murder in the first degree upon the body of Davis Robertson and divers other persons, and (4) conspiring to commit a felonious assault with intent to commit murder in the first degree upon the body of Thomas Copeland and divers other persons. Both of these plaintiffs in error were found guilty and sentenced to serve not more than ten years for each offense. Judgment was entered upon this verdict and the sentences were ordered to run concurrently.

In each count of the indictment it is alleged that the person whose life was sought to be taken and others were "acting as agents, servants and employees and contractors, and employees of contractors and sub-contractors of and with a certain motor transportation firm known as B & S Motor Lines, Inc., . . . ". This is a quotation from the first count of the indictment but the other counts allege substantially the same. This allegation in the indictments is necessary to bring the proof of the alleged conspiracy within the confines of the indictment.

In the outset we feel that it is fair to say that in this large record of some 1800 pages of proof, 93 pages in the technical record and a 99 page brief and assignments of error, the case throughout has been one of the best tried cases from the standpoint of both the State and the defense that has been our privilege to read. It took more than a week to try the case and several days were consumed with taking proof and the argument of the motion for new trial wherein all of the jurors were placed upon the stand by the defense, and certain questions and facts hereinafter to be referred to were developed. The trial judge was unusually fair, patient and painstaking in the trial of this case from the standpoint of all parties.

Under the facts as developed in this record the jury were clearly warranted in finding facts as follows: (The overwhelming preponderance in this factual situation as developed in this record supports such a finding): A strike was called in Nashville by the Teamsters Union at the B & S Motor Lines in early 1955. The strike was probably called off for a short time but under the proof it lasted from May 2, 1955, until October 16, 1955. During this period the plaintiff in error Smith had many uninvited contacts with the President of the B & S Motor Lines. A number of these contacts were late at night when Smith would appear, at times, on the property of the B & S Termi-

nal in Nashville. The record is probably without contradiction that on some of these occasions Smith used toward the President of this Company, and to his face, the most violent epithets and vituperative ursing that we have ever read. Smith in his testimony herein does not deny this fact but in effect admits it and says that the President likewise cursed him. His attitude toward this President is also shown by two or three instances of his demeanor and his actions toward this President, and of his threats towards this Company, if they continued to hire "ununion" employees to drive tractors and pull these large motor trailers or trucks belonging to the B & S Lines.

At the time this strike was going on B & S hired independent contractors and others to use their own cab or motor, that is, the independent contractors cab or motor, to pull and transport these large trucks to different points and particularly from the terminal of the B & S Motor Lines in Nashville to its terminal in Charlotte, North Carolina. These actions of the plaintiff in error Smith were shown to have happened a number of times in and around Nashville.

In June, 1955, the B & S Motor Lines sent two of these large trucks, at different hours, from their Nashville terminal to their North Carolina terminal. One of these trucks left Nashville on Saturday, June 11th, and the driver and owner of the motor drove it to his home out near Manchester and parked the truck at a place some 6 miles away from his home. He went home and spent the night. Sometime during the next day, which was Sunday, he left and drove through Knoxville on his way to North Carolina. He arrived at a filling station in Knoxville which is just practically across the street from the Labor Temple where the offices of the Teamsters Union were located, at that time, at about 10:00 o'clock that night. This motor left there around that time and when just within Knox County and

before it arrived at the Sevier County line the operator of this truck testifies that for some little distance, before the event hereinafter to be related occurred, cars had been following this truck—they did not pass as cars ordinarily did—and that just before he got into Sevier County this car, which was a two-toned red and white General Motors car (it was not known whether it was a Buick or a Pontiac), passed the truck and in a very few minutes a car came back toward them at a rather high rate of speed with his bright lights on and just as this car passed them a shot or shots were fired at this truck. It is certainly inferable that this car was the same one that had passed immediately before. This driver says when they got some three quarters of a mile away, at the top of a hill, they stopped and were not able to find where the truck was hit. Later when they got over into North Carolina it developed that one of the inside front tires (the truck carries dual tires in the front) had been shot into and the bullet that was found in this tire was taken out and turned over to the officers.

Later another truck of the B & S Motor Lines left Nashville, being pulled by a motor owned by an independent contractor and operated by one Copeland. This truck came through Knoxville and on out the same highway toward North Carolina. This truck was some hour or more behind the truck above related. The driver of this truck testifies that a similar red and white two-toned car passed them and then came back toward them with their bright lights on and shot through the windshield of the truck, the bullet striking the steering wheel and ricocheted off in the truck cab. This bullet was recovered and identified in the evidence as a 38 caliber bullet. After this shooting into the truck there were other shots likewise shot at the truck. All of this shooting occurred around midnight on Sunday, June 12, 1955.

The record shows without contradiction that the plaintiff in error, Smith, who was the assistant business agent

of this Union in Nashville, left Nashville some time about midnight on Saturday night, June 11, 1955, arriving in Knoxville and registering at the Farragut Hotel about 6:45 A. M. Sunday morning, June 12, 1955; that he registered under an assumed name and parked the car which he drove in the garage of the Farragut Hotel in his own name; that the car that he was driving was a new red and white two-toned Buick which he had borrowed from someone in Nashville; that on the Sunday night around 10:00 o'clock, at about the time the first truck was at the filling station across from the Labor Temple, Smith received a call at the Farragut Hotel and went down to the garage to get his car; that he had some trouble in getting it because he had registered under a different name from that in which the car was in; that due to this delay he cursed a little and finally, when he got the car out (the attendant drove it out ' the alley), he drove away very rapidly; that then within what the jury could have found, from the time he left there and went to the Labor Temple and on up the highway, this shooting could have taken place from this automobile. This automobile which was driven by Smith corresponded with the one that it was testified as the one from which the shots came and which was following these trucks.

On this same Sunday night at about 12:45 o'clock after midnight, Smith was admitted to a hospital in Maryville with a gunshot wound through the fleshy part of his arm near the elbow; this gunshot wound was made with a 38 caliber bullet; that Smith entered this hospital at that time and was hospitalized for some three or four days but that no one took him in the hospital as far as the record shows at the time. When he was able he was taken back home to Nashville.

The record also shows by a local florist that while Smith was in the hospital the local Union sent him flowers.

Smith refused to tell the doctor or law enforcement officers at the time how he got shot, merely telling them it was an accident. No one was mentioned by him or how this happened even though it was investigated by the Sheriff's office of Blount County and the law enforcement officers of the State.

Some two years after these happenings a woman who worked in the office at Knoxville of the local Teamsters Union testified before a Congressional hearing to certain facts. Upon learning of this the present indictment for conspiracy was brought against these parties. This woman testified herein that on Friday before this shooting occurred that the plaintiff in error, Reynolds, received a long distance call from Nashville and that he talked to plaintiff in error, Smith. All she heard them say was "the Farragut". Of course the inference is that Smith was going to stay at the Farragut Hotel and was coming over to Knoxville. A few days after the shooting but while Smith was in the hospital at Maryville, Reynolds ordered her to have flowers sent to Smith but to merely say on the card, "from a friend". About the same time, and after this Sunday night shooting, on Monday she says that Reynolds made the remark that there was some shooting the night before and if the bullet had not hit the steering wheel it would have killed one of these drivers. She also testifies as to the length of time that she worked for this Union which was prior to January, 1955, until November, 1956, and as to the time they moved their offices from Walker Boulevard to the Labor Temple. Their offices were in the Labor Temple in sight of this filling station at the time the foregoing events took place. This witness likewise states that there was a 38 caliber magnum pistol in the safe on Friday before these happenings on Sunday and that Saturday it was gone; that she and the plaintiff in error, Reynolds, and two other people had access to the safe. The record does not show what

happened to this pistol. Reynolds and Smith, both of whom took the stand, do not tell what happened to the pistol or where it went. She described the pistol to the officers and an expert made a drawing of this kind of a pistol and she identified it as that kind (a magnum 38). This is the way they get the magnum pistol in the record.

Other officers who were experts in the matter testify as to the bullets that were found after this shooting; that they came with a 38 pistol and that the plaintiff in error, Smith, was shot with a 38 pistol. In other words, the jury could clearly infer, and that is the only inference that they could draw from this evidence, that these shots into these trucks and the one that shot Smith were from the same pistol.

The plaintiffs in error each took the witness stand. It is the contention of Reynolds that the lady who worked in the office and testified against him as to incriminating things above referred to, as to what he had said and his actions, that she was no more than a common prostitute. He says he knew that at the time that he was elected as business agent of the local union about January 1, 1955, he taking office on January 3, 1955, and all during the time that she worked there under him. He detailed very definitely as to how at one time someone else had made some uncomplimentary remark to her and he found her crying and she, so he says, then when he was trying to comfort her, seduced him. He says that he had intercourse with her at will from then on out. He likewise says that he did not fire her for this reason but that she was later fired for being short in her accounts. The jury had proof to the contrary and clearly found that these statements that he made against her were unfounded.

Reynolds says that on the Sunday before this shooting occurred, that night that he took his mother-in-law to church (he did not take his wife because she was staying

home with the babies), and that after church he went to the Labor Temple for a meeting which was to occur at 2:00 o'clock and that he was in this meeting for a minimum of 2 hours. Smith, in his testimony, says that the reason that he came to Knoxville, leaving Nashville after midnight Saturday and arriving in Knoxville at 6:45 A. M. Sunday morning, was to attend this meeting at 2:00 o'clock on Sunday afternoon. Smith says that he went to sleep in his hotel room and overslept and did not get to the meeting until it was nearly over with.

Reynolds says that after this meeting was over that he started to drinking and was drinking when Smith arrived after the meeting was over. They tell a story then about going to a restaurant and getting something to eat, Reynolds still drinking while they were at the restaurant and then Reynolds taking Smith back to the Farragut Hotel where Smith says that he stayed until Reynolds called him at 10:00 o'clock that night.

Reynolds says that after he left Smith at the Hotel that he ran around over in Blount County after some girls and got more drinks, etc., and then that he came back to the Labor Temple and called Smith at 10:00 o'clock that night that he had these girls in Blount County and that was the reason that he called him so that Smith would come over and they would go over to Blount County to pick up these girls.

Both of these plaintiffs in error testify as to their regard for their wives and children and yet both in effect brag about their promiscuous activity with women wherever they went. Smith's excuse or reason for registering at the Hotel under an assumed name was that he did so so that he could have a woman there with him. He says that he called some woman after he got to Knoxville by the name of Viola (he did not remember her last name) but he could not get in touch with her and that this same Viola was a

woman that he had picked up on the road months before on a trip to Knoxville; that he brought her over here. Both of these plaintiffs in error say that their purpose for going to Blount County on this night was to get a woman or women.

They both, plaintiffs in error, deny that they shot into this truck, did any shooting at all except as hereinafter related and both say that Smith was shot when they were on the trip to Blount County around midnight looking for girls who got off from work at 1:00 o'clock. They say that Reynolds, when they were near Alcoa, had to relieve himself and (Reynolds says they drove off on a side road while Smith says they stopped on the shoulder of the road) that when Reynolds got out of the car and went to the back and yelled at Smith something about he believed he would shoot the tail lights out of the car with this old gun. Smith says that he had to get out for a like reason and walked back that way and while they were there and Reynolds was fooling with this old gun that is the way he got shot. Smith says that he did not feel the shot at first but later as he got back in the car under the wheel that it began to pain him and he began to feel the blood running down his arm then he said something to Reynolds that he should not fool with that "damned old gun". After they had gotten back in the car Smith says he began to feel faint and he scooted over out from under the wheel and that Reynolds then got in the car and drove him to the hospital and let him out at the door of the hospital and he entered as has heretofore been detailed.

Reynolds says that Smith told him when he went into the hospital that he did not have enough money and for him to get in touch with another agent in Chattanooga to get him some money to pay the hospital bill because he knew what they would do with him when they got him in the hospital; that he did not let Reynolds go in the hospital because he was in a hurry to get in touch with this

Chattanooga man and get the money and he did not think that it was anyone's business to know anything about who he was with.

Reynolds says that he then left Smith and drove to Chattanooga to the home of this other person and left the Buick automobile that Smith had brought from Nashville which he had borrowed from his friend there to be cleaned up; that he took the Chattanooga man's car and did not come back through Knoxville but then went on to his home in Union County and then came back to his office in Knoxville on Monday morning following. Neither one of these parties at that time, even though it was being investigated by the officers of the State and officers of the County, would tell anyone as to how this shooting of Smith and these other things took place. None of the factual situation as developed herein was told. Apparently, from this record, it was not known until some 2 years after happening to the law enforcement officers.

Smith confirms Reynolds' statements about most of these things yet as to minor things he at times says that he has to disagree with Reynolds on them.

Smith owned two automobiles. He gives as his reasons why he did not drive one of his two automobiles to Knoxville was that this friend of his liked to drive a convertible and that he, Smith, had a convertible and he loaned the friend the convertible and he drove the friend's brand new Buick to Knoxville, and that his other automobile was being used by his wife at that time to go to see a sick relative in Indiana.

Clearly under this factual situation the jury could and did conclude that the reason that Smith had this automobile some 200 miles away from its base and was using it on this night (from it did the shooting into these trucks and being shot himself in the process of this shooting), was an

effort to form an alibi for him. The alibis and excuses that they make why these things happened certainly fall far short of sounding or ringing like the truth. The far more reasonable and truthful sounding of the whole situation is that they were the parties in the car who did the shooting into these trucks.

Clearly all of these things were questions for the jury to pass on, that is, the weight to be given the various statements of the various witnesses, the inferences to be drawn from their statements and the credibility to be given these witnesses. All of this was a jury problem. All of these things of course are foreclosed by this verdict. Turner v. State, 188 Tenn. 312, 219 S. W. (2d) 188. Here the defendants are presumed to be guilty and we do not consider the question of whether or not beyond a reasonable doubt but whether or not the evidence preponderates against this guilt. Clearly the evidence here does not so preponderate, the preponderance is otherwise under this factual situation.

The defense is obviously based on an alibi. One witness offered as to the time these plaintiffs in error were seen here in Knoxville on the night of this shooting if his statements are accepted as correct would make it next to impossible for these plaintiffs in error to have been at the scene of the crime at the time it is fixed. Others are offered along this line. It must be remembered that the defense of alibi, like any other fact in the trial of a criminal prosecution, must be clearly, certainly and fully established by the proof, and these fact things, that is, of an alibi, are left to the jury, with other proof in the cause. Of course the court and the jury on alibi questions look to these factual situations with great strictness and attention, to avoid being misled by them, as alibis are easily concocted and it is easy for an alibi witness to be honestly mistaken about the particular times that these things happened.

This Court said in Cole et al. v. State, 187 Tenn. 459, 215 S. W. (2d) 824, that alibi evidence and its corroboration is to be received with caution and is to be weighed and determined like any other evidence. This obviously is and must be a correct rule. We have very carefully read all of this alibi evidence herein and clearly feel that it does not preponderate against the finding of the jury herein. Of course the plaintiffs in error in their argument take the position that it is absolutely true and consequently the acts of which these plaintiffs in error are accused would be impossible for them to have committed. We think that the evidence though shows otherwise.

Obviously a case of this kind must be based on circumstantial evidence because people or those who enter into a conspiracy to do a criminal act as that herein do not enter into a written contract or get out in the open but it is done in a devious method and in an effort to try to cover up the guilt of those accused of such conspiracy.

The question of admission and the reliance on circumstantial evidence to establish questions of this kind are ably and interestingly discussed in Wharton's Criminal Evidence, 12th Edition, Vol. 3, Sec. 980, et seq. This work says, among other things, that:

> "Circumstantial evidence may by itself be sufficient proof of the commission of a crime and sufficient proof on which to base a conviction."

This work further says (page 473):

> "In the effort to guard against improper verdicts, it is commonly stated that in determining the sufficiency of circumstantial evidence (1) all the essential facts must be consistent with the hypothesis of guilt, as that is to be compared with all the facts proved; (2) the facts must exclude every other reasonable theory or hypothesis except that of guilt; and (3) the

> facts must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that the accused is the one who committed the offense."

We think that under the factual situation as developed herein these plaintiffs in error are guilty under this applicable rule. The facts as supported by the only reasonable inference to be drawn from these facts cause an unbiased mind to reach such a conclusion. Of course, the inferences to be drawn from these things are questions for the jury and not for us. Liakas v. State, 199 Tenn. 298, 286 S. W. (2d) 856. When we see, as it appears here, that the evidence does not preponderate against such a finding we should not disturb the verdict on this question. Cathey v. State, 191 Tenn. 617, 235 S. W. (2d) 601.

In Woodruff v. Hughes, 2 Ga. App. 361, 58 S. E. 551, 553, that Court said:

> "The law recognizes the intrinsic difficulty of proving a conspiracy . . . The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances."

There are many cases supporting this statement and we know none to the contrary. From the factual situation herein certainly this conspiracy is tied together in such a way that it is inescapable under this record that these parties were parties thereto and guilty of the acts charged.

The books variously define conspiracy. The following taken from Words and Phrases, Vol. 8A, it seems to us is an acceptable and applicable definition of that term as applied to the facts of the instant case.

> " 'Conspiracy' is said to be an offense known to the ancient common law, antedating the statute of Ed-

> ward I; the most widely recognized definition of which declares a criminal conspiracy to consist of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful act, or an object neither criminal nor unlawful by unlawful means, or, as it has been more concisely expressed, the combination of two or more persons to do something unlawful, either as a means or as an ultimate end'' (page 375).

Under this definition there are literally hundreds of cases cited from most of the jurisdictions in the United States.

It is very earnestly contended in the assignments of error and brief, and was at the bar of this Court, that it was prejudicial error on the part of the District Attorney General to be allowed to ask prospective jurors on the voir dire if they knew Dave Beck, Jimmy Hoffa, or other high Teamster officials, on the theory that the questions were asked only for the purpose of prejudicing the jury against the defendants. We have read this volume, on the examination of the jurors on their voir dire, and certainly do not think that it bears this inference. A voir dire examination is for the purpose of advising counsel of the juror's qualification, interest, or bias, as a matter of fact, presupposing his statutory competence, that is, age, residency, etc. The subjacent purpose is to enable the exercise of one's peremptory challenges. Leach v. State, 31 Ala. App. 390, 18 So. (2d) 285. In this process, it has been held, and it seems to us fairly so, that proper fields of inquiry include the juror's occupation, habits, acquaintanceships, associations and other factors, including his experiences, which will indicate his freedom from bias. People v. Pers, 362 Ill. 298, 199 N. E. 812; Watson v. City of Bozeman, 117 Mont. 5, 156 P. (2d) 178; Mesarosh et al. v. U. S., 116 Fed. Sup. 345. Our case of Gray v. State, 191 Tenn. 526, 235 S. W. (2d) 20, is cited as authority in

support of the contention here made by the plaintiffs in error. Upon again reviewing this case, Gray v. State, supra, we do not think that it and the reasoning there is applicable to the factual situation as shown by the record in this case. We accordingly must overrule this contention.

It is very ably and earnestly argued by the plaintiffs in error that there was prejudicial error committed by the District Attorney General asking the plaintiffs in error when they were on the witness stand, and other witnesses, if they did not take the Fifth Amendment before the Senate Rackets Investigating Committee in Washington, D. C., after objection to such question was made by defense counsel. The record does not disclose that the district attorney general was allowed to continue to ask such questions before the jury after the question had been ruled on by the Court. The record shows that the District Attorney General asked the plaintiff in error Reynolds, on cross-examination, whether or not he took the Fifth Amendment but immediately upon objection the jury was instructed to disregard the attorney general's question to that effect.

On cross-examination of the plaintiff in error Smith the Attorney General asked him if he had told any law enforcement officer or authorities the details regarding how his arm was shot. After this question was asked there are several pages of colloquy between counsel and the court. Objection was made to this statement on the theory that it was leading to the question of whether or not Smith had taken the Fifth Amendment before the Senate Rackets Committee in Washington. The trial court very ably guarded the rights of both plaintiffs in error to anything improper and sustained the objections to questions along this line, especially when it looked like the question might lead to something that was improper.

The trial judge's instruction to the jury to disregard this question and not in requiring the witness to answer the same prevented it from constituting prejudicial error. Stokes v. State, 64 Tenn. 619; Marable v. State, ... Tenn. ..., 313 S. W. (2d) 451.

When the witness Freels, the young lady who had worked for the Union during the occurrence of the factual situation of what these men were indicted and convicted for, was asked what the plaintiff in error Reynolds said when he came to her home to talk with her about the case a short time before it was set for trial, she said, among other things, that he said he was advised by the Teamsters Union to go before the Investigating Committee and take the Fifth Amendment. This was competent because it was another circumstance which the jury could consider to determine the guilt or innocence of the defendant Reynolds.

About two volumes of this large record are taken up with the evidence heard and argument on motion for new trial. This evidence was the examination of various jurors and their conduct during the trial as well as the officers who had charge of them. It is very seriously argued and contended about how the jury was kept and that they were separated, etc., and that newspapers were allowed to be brought to their rooms and they read newspapers and saw newspapers on the street and listened to the radio and saw the television, etc. It is argued that it was error to have the jurors quartered in separate rooms in the hotel across from the Court House during the trial of this case. It is also argued that the jurors were permitted to use telephones in their rooms and that the jurors balloted on the verdict prior to the end of the case.

Each of the jurors, including the thirteenth juror, was examined by the plaintiffs in error relative to these matters. The jury officer, the assistant manager of the Hotel, maids and other employees of the Hotel were ex-

amined regarding these matters on this motion for new trial. The evidence taken from these witnesses was to the effect that the jury was quartered in four different rooms on the fifth floor of the Hotel. All of these rooms were within the view of the jury office when he was in the hotel corridor. The telephone circuits to these rooms were blocked so that members of the jury could only make calls to the Hotel desk and for room service. Some of the jurors listened to the radio. Most all of the jurors heard some of the television programs; one or two of the jurors heard newscasts on the television and remembered seeing the two defendants on the television screen but did not remember hearing any news of any consequence relative to the defendants or the trial of the defendants. One juror said he read something about it but it was boring and did not see anything in the paper that he had not heard all day, or something to that effect. Most all of the jurors saw the headlines in the Knoxville papers relative to these defendants and their trial as they entered and left the Hotel. The jurors were taken some three blocks up the street to a restaurant to eat and back and were allowed to take some exercise walks, etc., and taken out altogether to a place for a little exercise over the weekend. They were quartered together for some 7 or 8 days. None of the jurors were influenced by anything they saw or heard about these defendants except what they heard in the court room during trial. Every one of them says this and there is absolutely no showing on a careful reading and scrutiny of their testimony that there was any influence whatsoever rendered on any of these jurors by what they read or saw in the Hotel. Each one of them was asked specifically if when the bellboy delivered cokes, beer or what-not to them in their rooms if anything whatsoever was mentioned about the case and they all said specifically that there was not. There is no showing that anybody at all contacted these jurors. As some of them passed the newsstand on

the way in they stopped and bought a magazine or something of the kind. As they crossed the street naturally the newsboys hawking their papers with the headlines on it, those things were shown, but it is shown absolutely that nothing influenced these jurors one way or the other. One juror very succinctly states the proposition as follows:

> "I would like to say this, and that is with all credit to you and to these defendants and the attorneys, these defense attorneys. I never tried harder in my life to give a decision that I thought was just. This is the first time I ever had one. I tried to stay out of this. I just tried to do the best that I knew how under the circumstances. . . . This is in all honesty. I know to the best of my knowledge. . . . I would say that nothing interfered with my thoughts or thinking in this case, whatever. I mean, anything that happened over there—I never listened to anything more intently or tried any harder in my life to get it right. This is honest. I believe that entire group tried hard."

Each juror had a similar feeling, that is, that nothing that was seen or heard outside or while they were in the jury room influenced their verdict in the slightest; that the only thing that the lawsuit was decided on was the evidence that they heard from the witness stand and the charge of the court.

This question about the misconduct of the jury and their separation, etc., among other things showed that after the case was decided the jury disbanded; that their rooms which they occupied at the Hotel were searched by counsel for the plaintiffs in error and certain newspapers were found in these rooms which contained headlines relative to the plaintiffs in error and the Teamsters Union. Some of the jurors remembered seeing these, but by their actions, as above indicated, they were conscientious and made an honest effort to arrive at a fair verdict. This record shows

that they were indeed a very high class group of gentlemen. The record fails to show that they balloted on the guilt or innocence of the defendants until after the case was submitted to them for that purpose. Some of them of course discussed it with each other during the progress of the trial.

Quite a lengthy argument and much authority is cited in support of the plaintiffs in error's assignments that the reading of these newspapers is error. The State makes the contention that since none of the jurors were influenced by what they saw in the papers or any other acts complained of in this assignment of error that the verdict is valid. This assignment is based on such cases as Carter v. State, 77 Tenn. 440 (1882), and like cases, wherein the courts hold that if the account in the newspaper is prejudicial to the defendant and likely to interfere with his right to a fair trial, the reading of it by the jurors will be a ground upon which to have the verdict vitiated and a new trial granted. Other cases are cited by the plaintiffs in error in support of this proposition.

In the first place we would say that the Carter case was written by this Court many years before the Harmless Error Statute (1911) was enacted. (Section 27-117, T. C. A.) The overwhelming weight of authority is to the effect that the reading of a prejudicial article by the jurors may be a ground for a new trial but it can be overcome by showing that the jury was not influenced by the report, irrespective of its contents. This was certainly done herein, that is, that the jurors were in no way influenced by any of these things that they read or saw. There are many authorities that support the proposition, too, that this does not constitute error when the court instructs the jury that they should decide the case on evidence heard in open court and to disregard this fact. That was the instruction herein.

A case along the latter line which has very similar contents in it to that in the present case is Howell v. State (1952), 247 S. W. (2d) 952, 955, Arkansas. The court in this case after reviewing the headlines in the newspapers, etc., and quoting the charge of the trial court to the jurors said this:

> "In view of the above it does not appear that any prejudice was shown to have resulted, but it does appear that the court's admonition to the jury was thorough and the court was correct in refusing to grant a mistrial. In the Dolen case, supra, it was said:
>
> 'Now, when newspapers are abundant in towns and cities, and hasten to ventilate homicides, and to guess at conjecture or facts, and volunteer chimney corner opinions of law, if citizens were rendered incompetent to serve as jurors by reading such newspaper articles, or by forming opinions from mere rumor, it would be difficult to make up juries of intelligent persons, in many communities, for the trial of such cases.' "

That is certainly an applicable comment which applies in modern times, and applies to the factual situation herein.

The Supreme Court of Illinois in the case of People v. Malmenato (May 21, 1958), 150 N. E. (2d) 806, 813, after discussing at length and citing many cases ended up with this very apt and accurate statement:

> "An accused is entitled to a fair trial and his rights must be zealously guarded by court and counsel, but a reversal is not indicated merely because a newspaper prints some statement derogatory of the defendant during the trial. To warrant a reversal, it must reasonably appear at the jurors, or at least some of them, have been influenced or prejudiced to the extent that they cannot be fair and impartial. Such evidence is lacking in this case."

Considering the Taylor case, supra, in reference to newspaper articles, the case was written in 1882, and as we said before, the Harmless Error Statute (Sec. 27-117, T. C. A.). We think that now, after an examination and reading of the record and the evidence here of these newspapers and things before the jurors, what the jurors said about it, that there is no error. This at least was harmless error and in view of this Statute (27-117, T. C. A.), we must go along with what this Court said in Munson v. State, 141 Tenn. 522, 524, 213 S. W. 916, when this was said:

> "This statute forbids a reversal of any case coming to this court for any error in any part of the procedure below unless this court is of opinion, after an examination of the entire record, that the error complained of affected the merits. . . . (Citing authorities) . . . It was declared in all of those cases, as we, as others, that the merits of a criminal case is the guilt or innocence of the accused. Of course, there may be such a violation or disregard of some constitutional right of the accused, not affecting the merits, that would induce the court to order a new trial; but it is difficult to see how one who is guilty of the offense of which he has been convicted can justly complain at errors in procedure which had no direct or remote relation to the judgment rendered against them."

We cannot see any difference in the argument made under this question than one that might be made as to a challenge of the juror on the voir dire who states that he has read the newspapers, and based on these newspaper reports that he had formed an opinion or things of that kind, and to the present situation. In such a case on their voir dire examination merely because a prospective juror has formed an opinion from reading these papers

is not held to be disqualified unless it is a fixed opinion which it would require evidence to overcome. As to such a situation, a Federal Court (Union Elec. Light & Power Co. v. Snyder Estate, 65 Fed. [2d] 297-301) had this to say:

> "Based on this showing, counsel for plaintiff moved that the panel of prospective jurors be discharged. The motion being denied, counsel for plaintiff then moved that those jurors who had read the article be dismissed from the panel, and this motion was likewise denied. Peremptory challenges were then exercised, and there remained on the jury one juror who had read the headlines, one who had read half the article, and two who had read the entire article.
>
> Regardless of the character of the article, the first motion was properly denied because it asked for the discharge of the whole panel, while only certain of the members of the panel had read the article in whole or in part. The second motion was also properly denied because a juror is not disqualified from the mere fact that he has learned something of the facts, or of what are printed in a newspaper as the facts of the case."

Our case of Manning v. State, 155 Tenn. 266, 292 S. W. (2d) 451, supports such reasoning.

We think another reason why this assignment should be overruled is on direct examination the plaintiff in error Smith, made a long speech to the jury, and among other things that he said was, and this was done voluntarily, not in response to any question, that he no longer answered questions for police officers and newspaper reporters because he had read in the paper that he was an ex-convict and that he had seen his picture in the paper with a big number across it which embarrassed his 10-year old son. There is nothing in the record to indi-

cate that the headlines seen by the members of the jury during the trial of the case contained any remarks relative to the plaintiffs in error than those contained in Smith's testimony.

Thus it is that we think this contention must be overruled.

In discussing the previous assignment of error, that is, the separation of the jury in the Hotel, we neglected to state that in a very recent case, that of Steadman v. State, 199 Tenn. 66, 282 S. W. (2d) 777, related questions to those herein discussed were considered by this Court and are likewise controlling here. In the Steadman case the jury was separated and one of the jurors was a woman who stayed in one place. They likewise saw television, etc., but we held in that case that it was shown that there was no prejudice to the defendant and thus that their separation as was shown there did not vitiate the verdict.

It is not an improper separation for the jurors to occupy different rooms in a hotel, or the like, when they are under the supervision of the officer appointed and sworn by the court for this purpose. See State v. Shawley, 334 Mo. 352, 67 S. W. (2d) 74; Forester v. State, 36 Okla. Crim. 111, 252, p. 861; and Ramos v. State, 120 Tex. Crim. 512, 48 S. W. (2d) 286, and others.

The District Attorney General asked each of the jurors on their examination on the motion for new trial whether or not these newspaper stories and other information heretofore referred to that they had received in their hotel rooms affected the verdict and it was very strenuously objected to by counsel for the plaintiffs in error on the theory that this was allowing the jury to impeach its verdict. This was overruled by the trial judge and properly so for several reasons. In the first place all these jurors were put on the witness stand by the plaintiffs in error

in an attempt to show what information, etc., had reached them during the pendency of this trial. After they were turned over to the District Attorney General these questions were asked.

This is perfectly proper, if for no other reason due to the fact that they were put on by the plaintiffs in error in an attempt to show what had happened. The necessary inference in putting them on by the plaintiffs in error was to show that this had influenced the verdict, thus it is proper to show that it had not by their answer. In the second place this is not in effect impeaching their verdict. This is merely stating that when such and such had been brought before them that it did not influence them in the least, but they tried it on the law and the evidence as they had heard in court. In the third place, without more, the presumption is, of course, that the jury does decide the case on the law and evidence that they have heard under the supervision of the judge and at his direction. Thus it is when it is attempted to be shown that certain things outside of the evidence from that they heard on the witness stand was brought before them, as we referred to in our discussion of the voir dire on this question, it is to overcome any presumption that might be that this did influence their verdict. By reason of what was said it is entirely proper for the jury to state that it did or it did not influence them. For these reasons we think that there was no impeachment of the verdict and that the evidence was proper.

It was ably argued and assigned as error that the trial court committed prejudicial error in not declaring a mistrial because of what is argued the juror Daniels said on his voir dire examination; that he did not let the parties know that he at one time had been a member of the Teamster's Union. The argument is that this is propter affectum (on account of partiality) and that thus the juror was

biased or partial either actually or that partiality must be presumed to exist by reason of his having been a member of the Teamster's Union, and at the time that he was a member he had been fired and had a fight with one of the Teamsters. We have carefully read the examination on the voir dire and find that this discloses that this juror made no false accusations at that time. He testified in response to questions asked him that he had worked one time for Southern Dairies as a route supervisor and that he knew the plaintiff in error Reynolds on sight because of his work at Southern Dairies there with the members of the Teamsters Union. He was asked on this examination if part of his duties as a supervisor involved dealing with the Union and his reply was: "At Southern Dairies, Yes." He was then asked did he deal with the Union and his reply was that as a supervisor he was not connected with them. This witness stated on this examination (he was at that time being examined on his voir dire for jury service) that he was a member of a union at that time but not the Teamsters Union. On this the examination was apparently closed and it was concluded that he was acceptable.

There is nothing in this examination or his examination on the motion for new trial that shows that this man was biased or affected in any way by his former association or connection with the Teamsters Union. Because he had once been a member of that Union does not affect him or make him biased just from that standpoint alone. It seems that if counsel had wanted to follow this matter further and had not been satisfied when they accepted this juror that they were in a far better position, that is, the plaintiffs in error being representatives of that Union to know whether or not the man had been and what he had done, etc. One of the plaintiffs in error was at the time connected with the Union. If they had not been satisfied with him and had not thought that he would be a fair juror they could have then gone into the matter further. We

think there is no showing of propter affectum, that the juror was a biased or prejudiced juror. Reading his testimony convinces us, as it did the trial court, that he was fair.

It is assigned as error that the manager of the local Hotel in Knoxville, accompanied by a law enforcement officer, searched the hotel room occupied by the plaintiff in error, Smith, and on this search found certain things, that is, they searched it the day after this shooting in 1955 and found from certain information that they found that things in his room, his coat pocket and a traffic ticket, etc., that the name instead of the assumed name given was that of W. A. Smith; that this was violating his constitutional rights in searching his room without a search warrant. We do not think so because any evidence that they secured was purely for the purpose of ascertaining whether or not the person under the assumed name was that of Smith. In view of the fact that he (Smith) admitted on the witness stand that he did occupy that room and cited his reasons of why he occupied it under an assumed name (to have women with him) that this assignment of error is of no weight. It is consequently overruled.

In the outset, and to lay the ground for this conspiracy, evidence was introduced of a strike in progress between the labor union and the motor lines. One of the plaintiffs in error was assistant business agent of this labor union at that time. It is said that some of these things shown in the beginning about the contacts with Smith and the head of this labor union, etc., were entirely unrelated to the defense herein and that they were introduced to show purely that the plaintiff in error Smith was a vicious person. We think that this evidence was admissible for showing a motive for this offense. The fact is when you read this record it all fits and ties in so that it takes this to fill out a complete picture of the situation. By reference to

Wharton's Criminal Evidence, supra, situations of the kind have been held legal. As far as we can find there are none to the contrary. This will be seen by reading the complete section that we cited in Wharton's Criminal Evidence, supra.

It is ably argued, and assigned as error, that it was reversible error because the State was allowed to show in rebuttal that one of their witnesses, the witness Freels, had a good reputation for truth, veracity and chastity. This was, we think, very proper rebuttal evidence to meet the bias and prejudice of this witness which was introduced by the plaintiffs in error when they attempted to show that this witness was a common prostitute who had defaulted with the funds of the union, etc., and that she was the aggressor in an illicit relationship with the plaintiff in error Reynolds. Clearly when the plaintiffs in error attempted to show that she was this character of a woman it was entirely proper for the State to rebut this by showing to the contrary. This purely and simply left a question of fact for the jury to determine. Along the line, in supporting what we have said, see Peoples v. Perez, 276 P. (2d) 72, and Bracey v. U. S., 142 Fed. (2d) 85.

On direct examination the State in proving its case offered as a witness the president of the B & S Motor Lines. This witness apparently had a little book in which he had quite a number of notes from which he testified as to certain times and places and figures, and what was said and what not, by reading or referring to these notes. This was objected to and the court allowed the witness to refresh his recollection from these notes. Then when counsel for the plaintiffs in error took him on cross-examination he desired to have this book and read the notes himself. At first the trial judge would not allow counsel for the plaintiffs in error to read and examine these notes. At a later time, after lunch, the trial judge concluded that

he had made an error in not allowing these notes to be inspected by counsel for the plaintiffs in error. He changed his ruling and then allowed this inspection by counsel for plaintiffs in error. It is argued that this is error because there is a period of time of disconnection between the cross-examination on his first cross-examination and when he was allowed to see the notes and then examine them.

We do not think this error because if it had been error in the first instance it certainly would have been harmless and this was cured by the later allowing counsel to examine these notes and look at them. After two years time it was natural for anyone when they know they are going to be put on the witness stand to sit down and think about the matter and jot down notes before they got on the witness stand so that they could refresh their recollection from them. It is pretty hard for even those that are experienced to sit on the stand and recall things that happened two or three years before if they had not had an opportunity to think about them and jot it down.

Another argument in this assignment of error as to the testimony of this witness, was that the trial judge commented on the weight of the evidence. The situation in this regard really does not amount to a comment on the evidence under our constitutional guaranty of such. Here is what happened: This witness was asked to explain to the jury what he meant by the term "independent contractors". He had testified on direct examination that these truck bodies contained freight that he was hauling; that these bodies had the names (B & S Lines) on them, but that as far as the actual operation, that is, the cab and the motor that pull these trucks, was let out to independent contractors. It was these independent contractors who were pulling the truck at the time this shooting happened. When this was objected to he attempted to explain to the jury what he meant by independent contrac-

tors. The trial judge, in effect, sustained the objection and stated that it was not particularly important for the jury to know the definition of an independent contractor, that the main thing that the jury should know was whether or not there was a labor dispute affecting these motor lines. We think that this clearly is not a comment on the weight of the evidence in such a way that would at all violate any right of these parties. It was just the natural comment and not one that is at all injurious. It is not in the sense of telling the jury that such and such is a fact and that such and such is not a fact or what is and what not. We think that this assignment is wholly without merit.

During the trial of the case two witnesses were called by the State who were members of the Teamsters Union. Apparently these witnesses were very hesitant and the State had information or had been given statements prior to this hearing contrary to what they attempted to say on this trial. Objection was made then to the apparent cross-examination or what amounted to that by the District Attorney General of his own witness. On this being done the jury was excused. While the jury was out the trial judge in effect lectured each of these witnesses and told them that all they were there for was to tell the truth and the whole truth and nothing but the truth, and he did not want any equivocation out of them and if there was any perjury in there they were going to be punished for perjury, etc. These statements of the trial judge were made out of the presence of the jury. There certainly can be no error in this. This question is interestingly discussed in 53 Am. Jur., Sec. 22, page 40. The paragraph ends with this statement:

> "In any event, the commitment of a witness is not prejudicial where it is made without knowledge of the jury; and does not have the effect of intimidating the witness."

Our reading of this record convinces us that the statements of the trial judge to these witnesses at the time he made them were warranted. They were not made before the jury and later on when the trial judge was not sure whether or not the statement to one of the witnesses had been made before the jury he properly instructed the jury that they were not to consider what he had said to this witness or regard it for any reason at all. This, if it had been a misadventure at the time that it was made (if it had been made before the jury), certainly is not prejudicial error and under the Harmless Error Statute (27-117, T. C. A.), would not be erroneous.

Reading this record one finds that after all this skirmish between counsel for the State and counsel for the plaintiffs in error, and argument to the Court over trying to elicit certain evidence from the owner of the car that Smith had driven from Nashville to Knoxville (the witness apparently trying to evade it in every way possible), ended up by a stipulation that he did own the car, its color, the time it was bought and its license number, etc.

It is assigned as error that the trial judge erred in refusing or in failing to instruct the jury on lesser included offenses embraced in the offense charged by the indictment. We think that it would have been error probably if he had instructed the jury on a lesser included offense under this and that certainly there is no error to not do so. A lesser included offense would have been barred by Section 40-205, T. C. A., as these charges happened more than 2 years before the indictment was found. If they had been convicted on a lesser included offense they would be entitled to be discharged. Wilson v. State, 15 Tenn. 516; Hickey v. State, 131 Tenn. 112.

The jury was instructed regarding such an offense in the Fifth Count of the indictment, and the jury did not

fix the plaintiffs in error's punishment at a fine and jail sentence as it could have done under the instructions given by the court on the Fifth Count if the jury had been so inclined. They found for the plaintiffs in error under the Fifth Count in which they were instructed on the lesser offense. Furthermore, from reading this record the evidence is absolutely overwhelming and preponderates in favor of the guilt of the greater offenses.

The full argument of the District Attorney General as was made to the jury is contained in one small volume among the volumes of this record. The plaintiffs in error complain as to portions of this argument. They assign it as error wherein the District Attorney General argued that if they found the plaintiffs in error not guilty and turned them loose that they would be branding a woman witness who testified against one of them, as a whore. This is not error because that is exactly what the plaintiffs in error attempted to do in their testimony about this woman. There is certainly ample proof in the record, what the plaintiffs in error said themselves, that entitled this to be argued and answered by the District Attorney General. Complaint is also made along this line that the District Attorney General argued in effect and contended in his argument that the plaintiffs in error were criminals and gangsters. This argument was warranted by the evidence, if for nothing more was warranted under the voluntary statement made by the plaintiff in error, Smith, that he had been so branded over a period of time. Arguments of the kind were not prejudicial or intemporate but were warranted from the facts and circumstances of the case. When such is true certainly the District Attorney General cannot be censored for arguing the facts as he saw them.

After having spent, uninterruptedly, more than one week in reading this record, the authorities, and thinking

about it pro and con between times as one must, we are convinced that the plaintiffs in error had a fair trial and that the evidence adduced herein clearly shows their guilt. We can find no error in the record and it is for the reasons herein expressed that the judgment below must be affirmed.

It is with apology that we have had to write such a long opinion to cover all the serious contentions that this large record warrants. Judgment is affirmed.

Hamilton S. Burnett, J.

APPENDIX B.

William A. Smith and
William J. Reynolds,
vs.
State of Tennessee.
} Knox Criminal.

Opinion on Petition to Rehear.

(Filed Sep. 3, 1959, W. H. Eagle, Clerk.)

Counsel for the plaintiffs in error have filed a dignified and respectful petition to rehear in this cause. The basis of this petition is purely a re-argument of what was heretofore forcefully and ably argued at the bar of this Court and in the briefs originally filed. Primarily this petition is based upon the fact that some of the jurors (quoting again in the petition to rehear the evidence of certain of the jurors which was quoted in the original brief) had an opportunity and did read certain newspaper reports published during the trial of the cause.

We gave this and all questions raised in this petition very serious and careful study, and thought, before preparing our original opinion. It is true we did not take up each of these specific items as argued because in our judgment they were all covered by what we said in our opinion specifically from pages 16 to 24. We did not overlook any of these things and were clearly convinced that the questions raised were not prejudicial to the plaintiffs in error for the reasons therein stated.

Some additional authorities in support of these contentions are now cited, one in particular is Marshall v. U. S., which was decided on June 15, 1959, by the Supreme Court of the United States as is reported in 3 L. Ed. (2d) 1250.

We had read the advance opinion before releasing our opinion but did not mention it in the opinion because the opinion had been prepared prior to our receipt of this opinion. This opinion recognizes that in such matters as here presented the trial judge has a very large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. The Court cites Holt v. United States, 218 U. S. 245, 251, as its authority for this recognition. The Holt case was read by us prior to our preparation of the original opinion. We for the reasons expressed in our opinion held that there was no abuse of discretion of the trial judge in his action herein and further held by reason of the proof offered on the motion for a new trial that there was no prejudice, in our judgment, to the plaintiffs in error by reason of these facts. The Marshall case is really authority for nothing more than that the Supreme Court of the United States says:

> "In the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts (Bruno v. United States, 308 U. S. 287; McNabb v. United States, 318 U. S. 332), we think a new trial should be granted."

This Court likewise recognizes a supervisory power over trial courts in the interest of fairness and justice to defendants who are there tried. In exercising this thought and jurisdiction we concluded under this record that there was no error herein.

We are firmly convinced that there is no violation of the right of due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States or of Article 1 of the Constitution of Tennessee to these defendants.

For the reasons herein stated, the petition to rehear is accordingly denied.

Hamilton S. Burnett, J.

APPENDIX C.

In the Supreme Court of Tennessee,
At Knoxville.

September Term, 1958.

Monday, July 27th, 1959.

William A. Smith and
William J. Reynolds
vs.
State of Tennessee.
} No. 1 Knox County Criminal.

(1) Conspiracy to take the Life of Davis Robertson and divers other persons.

(2) Conspiracy to take the Life of Thomas Copeland and divers other persons.

(3) Conspiring to commit a Felonious assault with intent to commit murder in the first degree upon the body of Davis Robertson and divers other persons.

(4) Conspiring to commit a Felonious assault with intent to commit murder in the first degree upon the body of Thomas Copeland and divers other persons.

Affirmed.

(Filed Aug. 3, 1959, W. H. Eagle, Clerk.)

Came the plaintiffs in error William A. Smith and William J. Reynolds in proper person and by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Knox County; and upon consideration thereof the Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered by the Court that the plaintiffs in error, for their offense of (1) Conspiracy to take the life of Davis Robertson and divers other persons, (2) a Conspiracy to take the life of Thomas Copeland and divers other persons, (3) Conspiring to commit a felonious assault with intent to commit murder in the first degree upon the body of Davis Robertson and divers other persons, and (4) Conspiring to commit a felonious assault with intent to commit murder in the first degree upon the body of Thomas Copeland and divers other persons, be delivered to the Warden of the penitentiary, or his agent, and by him conveyed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more then Ten (10) years each, and not less than Two (2) years each on counts one, two, three and four to run concurrently, commencing on the date taken into custody by the Sheriff of Knox County being July 27th, 1959, as to William A. Smith and William J. Reynolds.

It is further ordered by the Court that plaintiffs in error be disqualified from holding any office under this State. The plaintiffs in error will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Knox County, directing that Court to proceed with the collection of the cost of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Knox County, which will be his authority for delivering the plaintiff in error to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

(signed) A. B. Neil,
Hamilton S. Burnett,
Pride Tomlinson.

APPENDIX D.

In the
Supreme Court of Tennessee,
at Knoxville.

September Term, 1958.

William A. Smith and
William J. Reynolds,

vs.

State of Tennessee.

} Knox Criminal.

Stay Order.

(Filed July 28, 1959, W. H. Eagle, Clerk.)

On application of the defendants, named appellants herein, it appearing to the Court that the defendants are desirous of taking further proceedings in the above styled cause and particularly the applying to the United States Supreme Court for a writ of certiorari whereby review may be had by said court, and it further appearing to the Court that the defendants are desirous of furnishing bond and of remaining at liberty pending the taking of further steps herein, good and sufficient reasons to the Court appearing, it is

Ordered that the action on the procedendo entered and directed to the Criminal Court of Knox County, Tennessee, be, and the same is, hereby stayed, and the defendants are hereby permitted to remain on their present bond before the Clerk of the said Criminal Court in the amount

of $10,000.00 on each, conditioned on their appearance and obedience to the further orders entered in this cause.

(signed) A. B. Neil,
Chief Justice.

O. K. for Entry:

/s/ Cecil D. Branstetter,
Attorney for Defendant.

/s/ Thomas E. Fox,
Assistant Attorney General of Tennessee.

APPENDIX E.

In the Supreme Court of Tennessee, at Knoxville.

September Term, 1958.

William A. Smith and William J. Reynolds, vs. State of Tennessee. } Knox Criminal. Hon. J. Fred Bibb.

(Filed Aug. 6, 1959, W. H. Eagle, Clerk.)

To the Honorable A. B. Neil, Chief Justice and the Associate Justices of the Supreme Court of Tennessee:

Plaintiffs-in-error, William A. Smith and William J. Reynolds, through their attorney of record, would respectfully state to this Honorable Court as follows:

That on Monday, July 27, 1959, this Honorable Court announced its opinion in the above styled matter affirming their conviction in the Criminal Court for Knox County, Tennessee. That prior to having an opportunity to read the opinion rendered in said cause, counsel for petitioners made application to the Honorable A. B. Neil, Chief Justice, Supreme Court of Tennessee, for a stay order stating in substance that the petitioners would within the prescribed time petition for a writ of certiorari to the Supreme Court of the United States of America. However, since said application was presented to the Honorable Chief Justice and a stay order granted by the Honorable Chief Justice, counsel for the plaintiffs-in-error have had an opportunity to read the opinion rendered in this cause affirming said conviction.

Counsel for plaintiffs-in-error, after reading said opinion, has advised the plaintiffs-in-error, and said attorney

is of the opinion, that there are matters and things contained in the record and opinion that should be brought to the attention of this Honorable Court, and that the cause should be reheard.

Petitioners presented their application for a stay of execution of the judgment pending a petition to rehear and was informed that the rules of the Court do not permit such and that a petition would be entertained under the rules of the Court upon the plaintiffs-in-error surrendering to the Sheriff of Knox County. The plaintiffs-in-error are now in the custody of the Sheriff of Knox County having surrendered to said Sheriff pending the application for a rehearing of this cause.

Plaintiffs-in-error, therefore, make application to this Honorable Court for a setting aside of the stay order previously entered, such application for a rehearing is to be made rather than a petition for certiorari to the Supreme Court of the United States at this time. However, petitioners request that this petition and any order entered pursuant thereto does not prejudice them from making application for a stay order and bond in the event said petition to rehear is denied.

(Signed) Cecil D. Branstetter,
Attorney for Plaintiffs-in-Error.

I hereby certify that a copy of the above application was handed the Assistant Attorney General for the State of Tennessee this the 5th day of August, 1959.

(Signed) Cecil D. Branstetter.

APPENDIX F.

In the Supreme Court of Tennessee, at Knoxville.

September Term, 1958.

William A. Smith and William J. Reynolds, vs. State of Tennessee. } Knox Criminal. Hon. J. Fred Bibb.

Order.

(Filed Aug. 6, 1959, W. H. Eagle, Clerk.)

On application of the plaintiffs-in-error in the above styled matter being made to this Honorable Court setting out that a stay order had been granted on July 27, 1959, pending a petition for certiorari to the Supreme Court of the United States and an order entered permitting the defendants to remain on bond, pending further orders of this Court, and upon application of the plaintiffs-in-error to be permitted to present their petition to re-hear in this cause, and for good cause shown.

It Is Ordered, Adjudged and Decreed that said stay order signed by the Honorable A. B. Neil, Chief Justice, on July, 27, 1959, is hereby set aside without prejudice to the plaintiffs-in-error making such application again in the event of denial of the petition to rehear and the plaintiffs-in-error are in the custody of the Sheriff of Knox County, Tennessee, where they will remain pending the consideration of the petition to rehear by this Honorable Court.

(signed) A. B. Neil,
Chief Justice.

O. K. for Entry:

Cecil D. Branstetter,
Atty. for Plaintiffs-in-Error.

Thomas E. Fox,
Assistant Attorney General.

FILE COPY

No. 547

FILED
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JAMES R. BROWNING, C

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

WILLIAM A. SMITH and WILLIAM J. REYNOLDS,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

WILLIAM A. SMITH and WILLIAM J. REYNOLDS,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioners pray that a writ of certiorari issue by this Honorable Court to review an opinion of the Tennessee Supreme Court dated July 27, 1959, in the case of William A. Smith and William J. Reynolds v. State of Tennessee, not yet officially reported, but unofficially reported in 327 S. W. 2d 308. The denial of a petition to rehear in this cause was announced September 23, 1959, and is unofficially reported on page 327 of the same book and volume referenced above.

JURISDICTION AND QUESTIONS PRESENTED.

The petitioners seek to invoke the jurisdiction of this Court on the grounds that they were deprived of their rights guaranteed by the Fourteenth Amendment, Constitution of the United States, because of the opinion of the Tennessee Supreme Court. Their specific grounds are:

(1) The District Attorney General for the State of Tennessee, during the prosecution of the case in the trial court, was permitted to ask the petitioners if they had not claimed their privilege guaranteed them by the Fifth Amendment, Constitution of the United States, not to answer questions asked them before the Senate Rackets Committee (McClellan Committee) Washington, D. C.

(2) The jurors, during the trial of the case, read newspaper articles and listened to radio and television programs which reported incidents that took place during the trial of the case, that the trial judge would not allow to be presented to the jury in the courtroom.

(3) The prosecuting attorney, over objections of the defense counsel, asked prospective jurors on voir dire in the presence of other jurors if they were personally acquainted with Dave Beck, Jimmy Hoffa, and other officials of the Teamsters Union and during the trial of the case the trial judge made the statement that the only parties in interest in this case were the B&S Motor Truck Lines and the Teamsters Union.

EVIDENCE RELIED UPON BY THE STATE.

Counsel for the petitioners selected from the record in this case certain excerpts which must be considered in proper context along with other evidence in the case. In support of their second contention to the effect that the members of the jury were permitted to read newspaper

accounts and listen to radio and television programs regarding the case, they did not point out defendant Smith's voluntary statement to the jury to the effect that he no longer answered any questions asked by police officers, newspaper reporters, or anyone else because he had read in the newspapers that he was an ex-convict in language sufficient to embarrass his ten year old son and to poison him against newspapers and certain elements of law enforcement officers (Tr. 653-658). Neither did they point out that the defendants and their counsel stood at the entrance of the Andrew Johnson Hotel in Knoxville, Tennessee, where the jurors were quartered during the trial of the case and saw the newspaper man hold up copies of the daily newspaper which contained some of the headlines complained of in the petition for the jurors to see as they passed in and out of the hotel without making the matter known to the trial judge during the trial of the case when the incident occurred (Tr. 1278). They also failed to point out the fact that all the jurors, the court officers, and some of the personnel from the Andrew Johnson Hotel were called in at the instance of the petitioners to show that the jurors had been exposed to newspaper, radio, and television reports of the case and the findings of the Senate Rackets Committee. Some of the jurors stated that they had seen headlines regarding the subject of the trial at the entrance of the hotel, that newspapers were in their rooms during the trial, and they saw television programs. One juror recalled seeing a newspaper that contained information relative to the trial but only read a portion of it since he found it somewhat dull (Tr. 1288). Another juror remembered seeing the picture of the defendants on a television news report but did not recall any statement regarding the trial or the defendants (Tr. 1358). All of the jurors testified that they based the verdict upon the evidence heard in court and the instruction of the trial judge.

In connection with the facts recited relative to the third question raised in the petition to the effect that the prosecuting counsel was permitted to ask prospective jurors if they knew Dave Beck, Jimmy Hoffa, and other Union officials, and the trial judge stated that the only parties in interest in this case were the B&S Motor Truck Lines and the Teamsters Union. The petition does not show that the statement made by the trial judge was made for the purpose of determining whether or not any prospective juror would be disqualified because of a close relation with either of the parties involved in the case and it is not clear that any of the men who actually served upon the jury was present in the courtroom at the time the statement was made (Tr. 789 and 790), nor does the petition show that a labor dispute was in progress between the B&S Motor Lines and Local No. 327, Teamsters Union of Nashville, Tennessee, and that a number of heated arguments in which violent language flowed from each side took place between the defendant Smith as a Business Agent for the Teamsters Local and the Manager of B&S Motor Lines (Tr. 35 and 573-574).

Further, the petition does not show that the record contains an abundance of facts to justify the verdict of the jury.

BRIEF AND ARGUMENT.

Counsel for the State of Tennessee submits that the petition fails to show that the defendants were denied a right to a fair trial, due process of law, guaranteed them by the Fourteenth Amendment, U. S. Constitution. This Honorable Court said in **Leeper et al. v. State of Texas,** 35 L. ed. 225, 139 U. S. 462, that by the Fourteenth Amendment the powers of states in dealing with crime within their borders are not limited except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law. That law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary powers of the government unrestrained by the established principles of private right and distributive justice. **Hurtado v. California,** 110 U. S. 516, 535.

(1) The Tennessee Supreme Court found that it was not error to allow into evidence the statement Petitioner Reynolds made to a witness in the case that he was advised to take the Fifth Amendment by the Teamsters Union if called before the Senate Rackets Investigating Committee. (This statement was made to the witness about three weeks prior to the trial by Petitioner Reynolds at her home while he was requesting her to do what she could to have the trial of the case postponed) (Tr. 418-421 and 451-452). This is admissible in the Courts of this State as another circumstance to indicate the guilt of the petitioners. **Marable v. State,** ... Tenn. ..., 313 S. W. 451, and it is also the rule in other jurisdictions. 22 C. J. S. 954.

(2) The Tennessee Supreme Court, after examining the testimony relative to the seeing of newspaper and television reports by the jurors applied the rule of this Honorable Court and other Courts announced in **Holt v. U. S.**, 218 U. S. 245, 31 S. Ct. 2; 54 L. ed. 1021; **Shepherd v. Florida**, 95 L. ed. 740, 341 U. S. 50, 71 S. Ct. 549; **Marshall v. U. S.**, 360 U. S. 310, 79 S. Ct. 1171, 3 L. ed. 2d 1250; **Howell v. State**, 27 S. W. 2d (Ark.) 952; and **People v. Malmenato**, 150 N. E. 2d (Ill.) 816, in addition to a recent case decided by the Tennessee Supreme Court, **Steadman v. State**, 199 Tenn. 66, 282 S. W. 2d 777, and found that the petitioners were not prejudiced because of information obtained from the newspaper or television accounts of the trial, and that the circumstances in this case did not deprive the defendants of a fair trial or due process of law.

(3) The third contention of the petitioners to the effect that it was error for the prosecuting counsel to be permitted to ask on voir dire if the prospective jurors knew Dave Beck, Jimmy Hoffa and other Teamsters officials, the Tennessee Supreme Court said that it was proper for such question to be asked in order to determine the interest or bias, if any, of the prospective jurors. The Tennessee Supreme Court cited as authority for this proposition of law, **Leach v. State**, 31 Ala. App. 390, 18 So. 2d 283; **Watson v. City of Bozeman**, 117 Mont. 5, 156 P. 2d 178; **Mesarosh et al. v. U. S.**, 116 Fed. Sup. 345.

In view of the foregoing, counsel for the Respondent submits that there is nothing set out in the petition filed in this cause nor the record or opinion of the Tennessee Supreme Court to indicate that the law in its regular course of administration through courts of justice was not applied in this cause as required by the Fourteenth Amendment, U. S. Constitution, and in accordance with the ex-

planation contained in **Leeper et al v State of Texas**, supra.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

I certify that I forwarded a copy of this Answer to Petition for Writ of Certiorari to Mr. William A. Reynolds, Attorney at Law, 813 Market Street, Knoxville, Tennessee, counsel for the defendant, W. J. Reynolds, and a copy to Mr. Cecil B. Branstetter, Attorney at Law, Stahlman Building, Nashville, Tennessee, counsel for the defendant, William A. Smith, on this the ..... day of December, 1959.

Thomas E. Fox,
Assistant Attorney General,
State of Tennessee.

PETITION TO REHEAR

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 547.

OCTOBER TERM, 1959.

WILLIAM A. SMITH and WILLIAM J. REYNOLDS,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION TO REHEAR.

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PETITION TO REHEAR.

This is a petition to rehear an order denying a petition for a writ of certiorari in the above styled cause, filed in accordance with Rule 58 (2) of the Rules of this Court.

The petition for writ of certiorari was filed in this cause on November 27, 1959, and was denied on January 11, 1960.

The basis of the petition to rehear is the petitioners' wish to raise substantial grounds available to them although not previously presented. It is respectfully submitted by petitioners that there are left unanswered, by the denial of the writ of certiorari, certain questions basic to the administra

tion of justice by the State under the limitations of the Fourteenth Amendment to the Constitution of the United States.

A denial of a writ of certiorari does not in and of itself mean that the Court either approves or disapproves of the decision of the lower court. It is felt that in this particular case, by the denial of the writ which permits the state court decision to stand, other states in the administration of criminal justice can look to this decision as a criterion for a fair trial under the due process clause of the Fourteenth Amendment.

In view of this, petitioners will rely on one question in this petition. Such question being:

Does this Court have an obligation to make an independent examination of the record, of a state court conviction, of the facts and evidence of the case, where substantial deprivation of due process (fair trial) of the Fourteenth Amendment is alleged by the defendants, and supported by the record?[1]

Preliminary to the discussion of the obligation of this Court in regards to state court conviction, in violation of the due process clause of the Fourteenth Amendment, it would be well to first ascertain what is involved in the concept of due process. Most of the text book writers attribute the development of the concept of due process of law from the Anglo Saxon concept of Per Legem Terrae,[2] which today means those ingredients necessary to constitute a fair trial.

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[1] The Petition for a Writ of Certiorari originally filed in this cause on November 27, 1959, will be hereinafter referred to as Original Petition. See footnote 14 of the original Petition, page 19, Vol. I, page 1034, Nance v. Illinois, ... U. S. ..., 3 L. Ed. 2nd 1217.

[2] Griswold, The Fifth Amendment Today, Harvard University Press (1955), p. 81.

The application of the due process clause of the Fourteenth Amendment to state criminal action has long been recognized. In the controversy that has raged around what amendments of the Bill of Rights were incorporated into the Fourteenth Amendment, one fact has been clear, that is the due process clause of the Fifth Amendment, meaning a fair trial, is incorporated into the Fourteenth Amendment. This Court, in so holding, not only stated the fact, but explained the reason for such inclusion, as well as throwing considerable light on the concept of due process, in **Twining v. New Jersey.**[3] There the Court stated, in discussing the relation between the Fifth and Fourteenth Amendments and the incorporation of due process of the Fifth Amendment into the Fourteenth Amendment, that such were:

> "Not because these rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law. Few phrases of the law are so illusive of exact apprehension as this . . . This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise. There are certain general principles, well settled, however, which narrow the field of discussion, and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words 'due process of law' are equivalent in meaning to the words 'law of the land', contained in . . . the Magna Charta . . . This Court has never attempted to define with precision the words 'due process of law' . . . It is sufficient to say that there are certain immutable principles suggested which

[3] 211 U. S. 78; 53 L. Ed. 97 (1908).

adhere in the very idea of free government, which no member of the union may disregard."[4]

Again this Court, in **Betts v. Brady**,[5] stated:

> "The due process clause of the Fourteenth Amendment does not incorporate, as such the specific guarantees found in the Sixth Amendment, although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments, may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth Amendment."[6]

Denial of these rights is to be tested by an appraisal of the totality of facts in a given case.

One of the leading cases in a discussion of the concept of due process of the Fourteenth Amendment is **Palko v. Connecticut**,[7] where Justice Cardozo dealt in a succinct manner with those guaranties of the Fifth Amendment brought in to the Fourteenth Amendment. He enumerated those rights that are excluded, such as indictment by a grand jury, the right of self-incrimination, etc., in state tribunals. But he concludes:

> "In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the States.

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[4] Ibid, at pp. 99 to 102.

[5] 316 U. S. 455; 86 L. Ed. 1595 (1941).

[6] Ibid, at p. 461.

[7] 302 U. S. 319; 82 L. Ed. 288 (1937).

"If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed . . . Fundamental too, is the concept of due process, and so is that of liberty, is the thought that condemnation shall be rendered only after trial. (Cases cited therein.) The hearing, moreover, must be a real one, not a sham or a pretense . . . Does it (denial of certain rights) violate those fundamental principles of liberty and justice, which lie at the base of all our civil and political institutions?"[8]

This test of Justice Cardozo has been used by this Court in other cases to determine whether or not due process has been denied. (See **Adamson v. California,** and **Rochin v. California.**)[9] The Rochin case contains an excellent discussion of the concept of due process of the Fourteenth Amendment and its relation to State criminal proceedings. In the **Rochin** case, the Court, again struggling with the definition of the concept of due process, stated:

"Even though the concept of due process of law is not finally fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession . . ."

"Due process of law, thus conceived, is not to be derided as a resort to a revival of 'natural law'. To believe that this judicial exercise and judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought, is to suggest that the most important aspect of constitution adjudication is

[8] Ibid, at pp. 326-328

[9] 332 U. S. 46; 91 L. Ed. 1903 (1947); 342 U. S. 165; 96 L. Ed. 183 (1951)

a function of inanimate machines and not the judges . . .

"The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed, and each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts, exactly and fairly stated on a detached consideration of conflicting claims (Cases cited therein). On a judgment not ad hoc and episodic but duly mindful of reconciling the needs of both continuity and of change in a progressive society."[10]

In **Griffin v. Illinois**,[11] this Court, in discussing due process, stated:

"Due process is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standard and a progressive society. But neither the unfolding content 'due process' nor the particularized safeguard of the Bill of Rights disregard procedural ways that reflect the national historic policy."[12]

The Court in **Sweezy v. New Hampshire**,[13] said:

"The implication of the United States Constitution for . . . 'the concept of ordered liberty' implicit in the due process clause of the Fourteenth Amendment as against the State (cases cited), were not frozen as of 1789 or 1868, respectively. While the language of the Constitution does not change, the changing circumstances of progressive society for which it was de-

[10] Ibid. 342 U. S. at pp. 168-172.

[11] 351 U. S. 12; 100 L. Ed. 891 (1956).

[12] Ibid. at pp. 20, 21.

[13] 354 U. S. 234; 1 L. Ed. 2nd 1311 (1957).

signed gives new and fuller import to its meaning (Cases cited therein)."[14]

These cases do not by any means exhaust the definition of "due process of law" as contained in the Fourteenth Amendment when applied to state action. The purpose of these quotations is to illustrate the struggle the Court has had in attempting to define this abstract concept. In essence, it can be said that due process is that which is essential to a well-ordered liberty. One is compelled to turn to synonyms and other terms of like meaning in attempting to define well-ordered liberty. But as is repeatedly pointed out by this Court, the concept of due process is not a frozen one, but is a vital concept that changes from time to time and is utilized by the Court to meet such changing circumstances. However, despite this understanding of due process as a fluid concept, it can be said that due process is equated with a fair trial and a fair trial seeks to do justice. When one reads about a trial that frustrates justice by the absence of due process, one is, in the words of Justice Holmes, made to feel like he should vomit.[15]

Part of the question presented by petitioners, in this petition to re-hear, deals with the obligation of this Court to make independent examination of the record of state court convictions and the facts in evidence when the record shows that due process has been denied.

As early as 1821 in **Cohen v. Virginia**,[16] Chief Justice Marshall said:

> "The exercise of appellate power over the judgment of the state tribunals, which may contravene the con-

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[14] Ibid. at p. 206.

[15] See Original Petition, pp. 5-10, inclusive.

[16] 6 Wheat. 264; 5 L. Ed. 262 (1821).

stitution and laws of the United States, is, we believe, essential to the attainment of these objects (for which the national government was formed)."[17]

In **Davis v. Wechsler**,[18] Justice Holmes stated:

"If the constitutional laws of the United States are to be enforced, this Court cannot accept as final decisions of state tribunals as to whether facts alleged give rise to the right to bar the assertion of it even upon local grounds." (Cases cited therein)"[19]

In **Moore v. Dempsey**,[20] Justice Holmes said:

"We shall not say more concerning the corrective process afforded to petitioners than that it does not seem to us sufficient to allow a judge of the United States to escape the duty of examining the facts for himself, and when, if true, as alleged, make the trial absolutely void."[21]

One of the most succinct statements of the Court's duty in reviewing state criminal proceedings is contained in **Rochin v. California**.[22] The Court, after acknowledging its duty to be "deeply mindful of the responsibility of the states for the enforcement of criminal law", said:

"However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain

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[17] Ibid. at p. 415

[18] 263 U. S. 20; 68 L. Ed. 143 (1923)

[19] Ibid. at p. 24

[20] 261 U. S. 86; 67 L. Ed. 533 (1922)

[21] Ibid. at p. 92

[22] Supra, Note 9, 342 U. S. 165; 96 L. Ed. 183 (1951)

whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' "

"The Court's function in the observance of this settled conception of the Due Process Clause does not leave us without adequate guides in subjecting State criminal procedures to constitutional judgment."[23]

This Court has established its right, in reviewing state courts, that it can reach a different factual situation than that reached by the State Court. In **Napue v. Illinois**,[24] this Court stated:

"The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. (Cases cited therein.)":

" 'In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.'

"It is now so well settled that the Court was able to speak in (cases cited therein), of the 'long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.' "[25]

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[23] Ibid. at p. 169.

[24] Supra, Note 1.

[25] Ibid. at p. 1222.

In light of the above cases, it is respectfully submitted that the function of this Court was stated with eloquence and insight by Mr. Charles Fairman at the 1958 Conference on Law and Society of the Southwestern Legal Foundation. There he stated, in regards to this Court:

> "The Court has become the keeper of the nation's conscience. This is not a power that it snatched. This is a result of our history. It is an authentic product of our national experience. I would make bold to say that, in a very real sense, it is even more authentic than some Founder's utterance that may have been recorded in Madison's Debates, or than views expressed in the Federalist Papers. The country has come to expect that the Court will evolve, out of the constitutional text, a fundamental law that will indeed establish justice and secure the blessings of liberty.
>
> "This is especially true of the Fourteenth Amendment. The Thirty-ninth Congress, which framed it, employed broad language—not specific prescriptions. The Congresses that have come and gone have done little with the grant of power to enforce the Amendment. It has been left to the Court, passing upon individual claims raised in the course of orderly litigation, to build up this branch of constitutional law. Often there is criticism, sometimes well-founded criticism, of trends in decisions. Yet the duty to maintain a national standard of just dealing, by which state action will be measured, remains fastened upon the Court."[26]

This Court has, through a series of cases, sought to give some definitive meaning to Due Process. In seeking to breath life into that concept, this Court has stated that it

[26] Fundamentals of Criminal Procedure, Southern Methodist University Studies in Jurisprudence IV, SMU Press (1958), pp. 71-72.

has an obligation to review state court convictions where such is lacking, and even make an independent determination of the facts. In view of this, it is respectfully submitted that due process was lacking in this case. For support of this statement, see the Original Petition filed herein, and especially pages five to nineteen.

There is little doubt that if this had been perjured testimony introduced this Court would have little difficulty in reversing the state decision.[27] There is likewise little doubt that if this was a coerced confession this Court would have little difficulty in reversing the case.[28]

In view of this, the question can logically be asked: What is the difference between the violation of one's constitutional rights by permitting the introduction of a coerced confession; or the violation of one's constitutional rights by permitting the introduction of perjured testimony; and the violation of one's constitutional right to due process (fair trial) by having a prejudiced jury as a result of influence of matters outside of the Court. Reason and justice, in light of one U. S. Citizenship, demand more.

> "We are all members of one great body—the United States of America. Injustice toward even the least worthy human being among us may arouse the concern of all—and, if chronic, will call forth remedies in the courts of the nation. It is, of course, far better that procedure in first instance be so fair that there will be no reason for reversal on appeal. It is far better that, if injustice occur, it be corrected with the state's own courts. The only means of averting federal review, however, is to establish, in daily practice, so rational, so effective, so even-handed an administration

[27] *Napue v. Illinois*, supra, Note 1.

[28] *Blackburn v. Alabama*, 352 U. S. 191, 1 L. Ed. 2nd 240, (1957).

of criminal justice as to give no ground for interference. The beneficient requirements of the Fourteenth Amendments, as construed by the Supreme Court, exact nothing not easily attained by any state animated by a lively sense of its own responsibility for the manner in which its own law is administered."[29]

"Constitutionalism as here understood is not the same as majority rule. One principal purpose of constitutionalism, and the one here studied, is to establish certain protections of individuals and minorities as against the majority. In this area a constitutional tribunal at times must interpose itself between an individual and the righteous anger of a great majority of his fellows. That the tribunal thus may bring the wrath of the majority on its own head makes the performance of this duty no less imperative. It is in such a setting that the real struggles of individual human liberty under law must be won."[30]

Respectfully submitted,

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[29] Supra, Note 26, at pp. 81

[30] Ibid, at pp. 3-4

Certification

I hereby certify that the foregoing petition to rehear, filed in accordance with Rules 58 (2) of the Rules of the Supreme Court of the United States, is filed in good faith and not for the purpose of delay, and I further certify that the petition herein is restricted to the grounds above specified.

Cecil D. Branstetter

Certificate of Service

I, Cecil D. Branstetter, attorney for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that copies of the foregoing Petition to Rehear were this day served on adverse parties herein in accordance with Supreme Court Rules 21 (4) and 33 by depositing the same in the U. S. Post Office at Nashville, Tennessee, with first class mail postage prepaid addressed to counsel of record at his post office address, as follows:

Hon. George F. McCanless, Attorney General of Tennessee, Supreme Court Building, Nashville, Tennessee, and Hon. Tom Fox, Assistant Attorney General of Tennessee, Supreme Court Building, Nashville, Tennessee.

Cecil D. Branstetter

January ____, 1960